Supreme Court, U.S.
FILED

No. 00 941 DEC - 4 2000

OFFICE OF THE CLERK

In The
Supreme Court of the United States

DCT, INC. AND UTILASE, INC.,
Petitioners,

v.

OLYMPIC STEEL, INC.,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

***RODGER D. YOUNG**
TERRY WUESTER MILNE
YOUNG & ASSOCIATES, P.C.
22600 American Drive, Suite 305
Southfield, Michigan 48034

(248) 353-8620

Counsel for Petitioners
****Counsel of Record***

December, 2000

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

5-PP

QUESTION PRESENTED

DCT Inc., contends that the value of its wholly-owned subsidiary, Utilase Inc., declined as a result of Olympic's contractually-prohibited solicitation of DCT's chief engineer. Are damages for diminution in value to a corporation cognizable in a breach of contract action -- that is, can such damages meet the Hadley v. Baxendale foreseeability requirements, and was there appropriate evidence of a "causal link" demonstrated in this case?

PARTIES TO THE PROCEEDING

Petitioners

At the time of the underlying events, only DCT, Inc. owned more than 10% of the stock of Utilase, Inc. DCT, Inc. later sold all stock in Utilase, Inc. to Noble International, Ltd.

Respondents

Olympic Steel, Inc.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW vii

JURISDICTION vii

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED vii

STATEMENT OF THE CASE 1

ARGUMENT FOR GRANTING WRIT 2

ARGUMENT 1

DCT presented sufficient evidence of a causal link between Olympic's breach and DCT's damages 6

ARGUMENT 2

Damages for the diminution on value of Utilase meet both prongs of the Hadley v. Baxendale foreseeability alternative tests: the

damages "arose naturally" from Olympic's breach and they were "within the contemplation of the parties" when the contract was executed." 9

ARGUMENT 3

There is No Impediment to Recovery of Damages for Diminution in Corporate Value 18

CONCLUSION 23

APPENDIX 1a

APPENDIX A
Sixth Circuit Opinion, 9/6/00 . . . . . 1a

APPENDIX B
District Court Memorandum Opinion, 5/5/99 . . 3a

APPENDIX C
District Court Judgment, 5/5/99 . . . . . .18a

APPENDIX D
District Court Order Denying Reconsideration, 5/28/99 . . . . . 19a

TABLE OF AUTHORITIES

CASES

Aardvark Art v. Lehigh/Steck-Warlick
212 Ill.App.3d 492; 572 N.E.2d 472
(1991) 18, 20, 21, 22

Allen v. Owens-Corning Fiberglas Corp.
225 Mich. App. 397; 571 N.W.2d 530
(1997) 8

Collins v. Ralston Purina
147 F.3d 592 (7th Cir. 1998) 18

Hadley v. Baxendale
9 Exch.. 341; 156 Eng. Rep. 145
(1854) 9, 13, 15, 23

Kewin v. Massachusetts Mut'l
409 Mich. 401; 295 N.W.2d 50 (1980) 9

Lawrence v. Will Durrah
445 Mich. 1; 516 N.W.2d 43
(1994). 9, 14, 16, 17

LNC Investments v. First Fidelity Bank
173 F.3d 454 (2nd Cir. 1999) 8

Miholevich v. Mid-West Mut'l
261 Mich. 495; 246 N.W. 202 (1933) . . . 9, 10

Mohr v. Dix Mutual
143 Ill.App.3d 989; 97 Ill.Dec. 831,
493 N.E.2d 638 (1986) 14, 16

Salamey v. Aetna Casualty
741 F.2d 874 (6th Cir. 1984) 10, 12, 13

Sattler v. Fisher Contracting
30 Mich. App. 617; 186 N.W.2d 875
(1971) 8, 9

Tempo v. Rapid Elec. Sales & Service
132 Mich. App. 93; 347 N.W.2d 728 (1984) . 8

Wendt v. Auto Owners
156 Mich. App. 19; 401 N.W.2d 375
(1987) 12, 13

Windsor Shirt Co. v. New Jersey Nat'l Bank
793 F.Supp. 589 (E.D. Pa. 1992) aff'd.
938 F2d 490 (3d. Cir. 1993) 18, 19, 20, 22

OTHER AUTHORITIES

5 Corbin on Contracts, § 999 (1964) 9

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was not published. A Copy of the Opinion is included in the Appendix at App. A at 1a - 2a. The Opinion of the District Court for the Eastern District of Michigan is unpublished, and is included in App. B at 3a - 15a. The District Court ordered entry of Judgment on May 5, 1999, which is printed in App. C at 16a. Reconsideration was denied. App. D.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on September 6, 2000. This Petition for Writ of Certiorari is filed within 90 days of issuance of this Opinion. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

Respondent Olympic Steel, Inc. ("Olympic") breached an express Non Solicitation Agreement with both Petitioner DCT, Inc. and its subsidiary, Petitioner Utilase, Inc. (hereafter jointly "DCT") by soliciting, then hiring, Utilase's Chief Engineer, Mark Williamson. Because Mr. Williamson had unique knowledge of DCT's industry leading and highly proprietary laser blank welding process, Olympic's act caused a precipitous decline in Utilase's value. Ultimately DCT, Inc. sold Utilase at a severe discount because Olympic had lured Mr. Williamson from Utilase. DCT sued Olympic for breach of contract, seeking damages to remedy this precipitous diminution in enterprise value.

On or about May 6, 1997, DCT filed suit against Olympic; jurisdiction was based on 28 U.S.C. § 1332(a). The parties ultimately filed cross-motions for summary judgment. On May 6, 1999, the District Court denied DCT's motion, holding that whether Olympic's actions constituted "solicitation" was a question of fact for the jury -- that ruling is not at issue here. However, on the same date, the Court granted Olympic's cross motion, concluding that: (1) DCT had not presented sufficient evidence to show a causal link between the breach and the damages sought, and (2) the type of damages sought were not recoverable as a matter of law. App. B at 8a, 12a.

The Court denied DCT's timely motion for reconsideration. App. D.

The District Court erred by granting Olympic's motion for summary judgment, in two respects. First, DCT set forth more than sufficient evidence to create a dispute of material fact on the causal connection between Olympic's breach and DCT's damages, but the Court focused on and improperly resolved a dispute of fact against DCT. More importantly, the Court erred in concluding that the type of damages sought are not recoverable and are not supported by the fundamental requirements of Hadley v. Baxendale and its progeny.

Petitioners filed a timely appeal with the Court of Appeals for the Sixth Circuit. On September 6, 2000, the Court of Appeals affirmed the District Court's judgment in an unpublished Per Curiam Memorandum Opinion. App. A at 2a. The Court of Appeals' decision so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court as to call for the exercise of this Court's supervisory power.

ARGUMENT FOR GRANTING WRIT

In the early 1990s, DCT, through its then-wholly-owned subsidiary, Utilase, was the industry leader in the

laser blank welding field. This was largely due to innovations that DCT pioneered under the guidance of Mark Williamson, its chief engineer.

By late 1995, Olympic Steel, Inc., became interested in entering the laser blank welding field. One way to enter this market was by purchasing Utilase from DCT; in January, 1996, Olympic and DCT began discussions of such a sale. In order to conduct due diligence and to examine the Utilase facilities and finances, Olympic signed an agreement which expressly prohibited it from soliciting Utilase employees for a two year period,[1] if the purchase did not proceed. During the due diligence tour, Olympic representatives met Mr. Williamson, Utilase's second in command. Soon after

---

[1] The clause at issue, which forms the basis of this appeal, provided as follows:

> 8. During the period of two years commencing on [January 11, 1996], **[Olympic] shall not solicit or actively seek to solicit the services, as employee, consultant or otherwise, of any person** who during such period is employed by DCT or [Utilase], whether or not such person would commit any breach of his contract of service in leaving such employment. (Emphasis added.)

meeting with Mr. Williamson, Olympic abruptly broke off negotiations without explanation.

A mere six months after signing the non solicitation agreement, Olympic embarked on a calculated scheme to entice Mr. Williamson from Utilase. The solicitation was successful, and Olympic hired Mr. Williamson in November, 1996.

DCT immediately sued Olympic for breach of the Non Solicitation Agreement because the damage caused by Olympic's breach began to occur immediately. That is, when the industry as a whole became aware of Mr. Williamson's departure, the enterprise value of Utilase plummeted. Without Mr. Williamson, Utilase was worth significantly less than it had been with him at the helm. This resulted not only from the loss of his skills but also from the sheer fact of his departure; Utilase's technology and know-how were no longer solely and securely held at Utilase.

During the time that Olympic was soliciting Mr. Williamson (Aug - Nov 1996) DCT was engaged in negotiations with another company, TWB, for the sale of Utilase for as much as $28 million. However, when TWB learned of Mr. Williamson's departure, it abandoned its proposed purchase of Utilase because TWB believed that Mr. Williamson's laser blank welding knowledge was one

of Utilase's key assets. Eventually, DCT sold Utilase in late 1997 to Noble, Inc. for $13.1 million -- nearly $15 million less than its value one year earlier.[2]

The purpose of the Non Solicitation Agreement was clear to both signatories, at the time it was entered into. Indeed, Olympic's Chief Executive Officer conceded during his deposition that its purpose was "to prevent reduction in the value of the company by removing from it [a] potentially valuable employee." Clearly, he knew that if Olympic solicited Mr. Williamson (obviously a "valuable employee") such action could reduce the value of Utilase by depriving it of a crucial resource.

Furthermore, Olympic's CEO also admitted that at the time he was considering the purchase of Utilase, he was fully aware that other companies were looking to purchase Utilase. In light of these two admissions, Olympic knew or should have known that theft of a key

---

[2] DCT presented the Affidavit of Noble's CEO, who acknowledged that Noble would have been willing to pay more to purchase Utilase, if DCT could have assured Noble that Utilase's confidential information would not have been available to a Utilase competitor. With Mr. Williamson gone, DCT could not make these assurances.

technical employee would reduce the value of Utilase in a sale to one of several prospective purchasers.

In the District Court, DCT set forth pages of details chronicling Olympic's improper solicitation, pursuit and hiring of Mr. Williamson. The District Court found that there was a dispute of fact over whether these acts constituted "solicitation," and held that "[c]redibilty of the witnesses is for the fact finder to assess, not the court." This Petition assumes that whether Olympic's actions constituted "solicitation" is properly for the jury to decide.

ARGUMENT 1

DCT presented sufficient evidence of a causal link between Olympic's breach and DCT's damages

DCT's theory of liability is that Olympic breached the Non Solicitation Agreement by soliciting Mr. Williamson, thereby causing him to leave DCT. As a direct result of Olympic's actions, Mr. Williamson was removed from the helm of Utilase's laser blank welding operations. Once Mr. Williamson left for a competitor, Utilase could no longer ensure that its technology remained secure within the company; because of this, the value of Utilase declined.

Olympic moved for summary judgment, contending that there was no causal connection between Olympic's breach and the decline in value of Utilase. When faced with this motion, the Court should have focused on whether there was evidence that Olympic's breach injured DCT. That is, whether there was evidence that Olympic's breach caused the value of Utilase to decline. Instead, the Court focused on DCT's failed negotiations, apparently assuming that DCT's case must fail unless it could prove that Olympic's breach caused one specific potential buyer -- TWB -- to discontinue negotiations.[3]

---

[3] In its focus on the failed negotiations, the Court also erred by delving into a dispute of fact between the parties. Olympic focused on why one specific potential buyer, TWB, withdrew its Offers to Purchase Utilase just after Mr. Williamson left Utilase. Indeed, Olympic submitted an affidavit of one of the two TWB officers who structured the TWB offer to purchase Utilase. DCT appropriately responded by relying on the affidavit of the other TWB officer who worked on the purchase offers, which established that the withdrawal was due to the breach by Olympic. However, the Court impermissibly resolved this dispute of fact by expressly crediting the affidavit proffered by Olympic, the moving party. The Court erred by deciding this issue of fact; the Court should have permitted this issue to go to a jury.

The fact that factors other than Olympic's breach may have contributed to the decline in value of Utilase, does not preclude DCT from presenting its evidence to a jury. Under Michigan law, there may be more than one proximate cause of an injury. Allen v. Owens-Corning Fiberglas Corp., 225 Mich. App. 397, 401; 571 N.W.2d 530; 532-533 (1997). Indeed, two causes frequently operate concurrently so that both constitute a direct cause of the resulting harm. Id. Therefore, a defendant cannot escape liability for its conduct simply because the conduct of others may also have contributed to the injury suffered by a plaintiff. Owens-Corning, 225 Mich. App. at 401-402; 571 N.W.2d at 533. See also LNC Investments v. First Fidelity Bank, 173 F.3d 454, 464-465 (2nd Cir. 1999) ("[T]he presence of other contributing causes may not preclude recovery" in breach of contract case).

For the same reason, the defendant's breach of contract need not be the only cause of injury to a plaintiff; rather, a plaintiff must show only that defendant's actions were a cause of plaintiff's injury. See Tempo, Inc. v. Rapid Elec. Sales & Service Inc., 132 Mich. App. 93, 103; 347 N.W.2d 728, 733 (1984) (on appeal from verdict for defendant on its counterclaim, plaintiff argued that damages could have been caused by factors other than plaintiffs' conduct; court held that plaintiffs "were free to present their own evidence that other factors were in fact the cause of the damages."); Sattler v. Fisher Contracting

Co., 30 Mich. App. 617, 621-622; 186 N.W.2d 875, 877-878 (1971) (existence of another potential cause of damages held not to preclude plaintiff from alleging that defendant's conduct caused damages); 5 Corbin on Contracts, § 999 (1964).

DCT presented sufficient evidence of a causal link between Olympic's breach and DCT's damages.

ARGUMENT 2

Damages for the diminution on value of Utilase meet both prongs of the Hadley v. Baxendale foreseeability alternative tests: the damages "arose naturally" from Olympic's breach and they were "within the contemplation of the parties" when the contract was executed."

Under Hadley v. Baxendale, 9 Exch. 341; 156 Eng. Rep. 145 (1854), a plaintiff must prove either that its damages "arose naturally" from the breach or that the damages were in the "contemplation of the parties when the contract was executed." Lawrence v. Will Durrah & Assoc., 445 Mich. 1, 13; 516 N.W.2d 43, 48 (1994); Kewin v. Massachusetts Mut'l Life Ins. Co., 409 Mich. 401, 414; 295 N.W.2d 50, 52-53 (1980); Miholevich v. Mid-West Mut'l Auto. Ins. Co., 261 Mich. 495, 498; 246

N.W. 202, 203 (1933); Salamey v. Aetna Casualty & Surety Co., 741 F.2d 874, 877 (6th Cir. 1984)(Mich. law). DCT presented evidence sufficient to show that its damages are recoverable under either of these tests.

First, the damages sought here are cognizable because they arise naturally out of Olympic's breach of contract. The contract at issue was a Non Solicitation Agreement, and the primary purpose of a Non Solicitation Agreement is to prevent precisely what happened here from occurring -- to prevent one company from benefitting at the expense of the other by raiding the key employees of the target company. Thus, damages that flow from the loss of a key employee unquestionably arise naturally from the breach of this kind of contract.

Olympic's primary argument in support of its contention that the damages did not arise naturally is based on the fact that Mr. Williamson was an at-will employee, and that it is not typical for theft of such an employee to reduce the value of a company. However, this particular employee was the Chief Engineer with intimate knowledge of all the confidential technological processes supporting Utilase's laser blank welding operations. He was subject to a stringent Confidentiality Agreement that contained provisions intended to prevent him from using Utilase's confidential and proprietary information for a competitor. Therefore, the fact that he was working as an at-will

employee should not be interpreted to mean that DCT did not recognize Mr. Williamson's value to Utilase. Olympic itself considered him to be the nucleus to its own new joint venture. Theft of a high-level employee with such specialized information can reasonably be expected to negatively affect the value of the company that loses him. Such damages typically arise naturally from the loss of a key technological employee, and in this case, arose naturally from Olympic's breach of the Non Solicitation Agreement.

Furthermore, this was a contract for non-performance. In other words, in most breach of contract cases, Party A contracts with Party B for Party B's affirmative performance and when Party B breaches, Party A sues for failure to perform an affirmative obligation. In such a case, it may indeed be difficult for Party B to anticipate, at the time of contracting, what damages will arise as a natural consequence of its breach. Here, however, DCT specifically contracted for Olympic's non-action; that is, for Olympic NOT to do something that it would otherwise be lawfully permitted to do. The contract formally reduced to writing DCT's message that "if Olympic does what it agrees not to do, it will injure DCT." Thus, the nature of the contract itself supports DCT's assertion that the damages it suffered arose naturally from the breach of the agreement.

When called on to determine whether particular damages arise naturally from a breach, Michigan courts have consistently construed this phrase very broadly. See e.g., Wendt v. Auto Owners Ins. Co., 156 Mich. App. 19, 27-29; 401 N.W.2d 375, 379-380 (1987); Salamey v. Aetna Casualty & Surety Co., 741 F.2d 874, 877 (6th Cir. 1984)(Mich. law). In Wendt, the plaintiff operated a family trucking business, and his truck was damaged in a collision; he sued the insurer for breach of contract, seeking in relevant part: (1) lost profits, (2) damages for loss of use of the truck, (3) lost use of settlement proceeds, and (4) additional costs incurred from his default on the note securing the new truck. Wendt, 156 Mich. App. at 27; 401 N.W.2d at 378. The Trial Court dismissed these damage claims, finding that they did not "arise naturally" from the breach. However, the Court of Appeals reversed, noting that the defendant was aware that plaintiff was involved in a family trucking business and that the loss of a truck could cause extreme financial hardship to plaintiff and his business. Wendt, 156 Mich. App. at 29; 401 N.W.2d at 380. The Court found that the claimed damages for "lost profits" arose naturally from the breach:

> With respect to the loss of use of the settlement amount, defendant's refusal to pay plaintiff's claim would logically result in the loss of the use of the settlement amount . . . . Thus we hold the

> loss of the use of the settlement amount from the date it should have been paid until the date of the filing of the complaint can be said to have arisen naturally from the breach. Similarly, loss of the use of a vehicle and costs arising from the default on the note secured by the vehicle can also be viewed as natural consequences of defendant's failure to pay the settlement amount on a vehicle sustaining serious collision damage.

Id. (Emphasis added.). The Wendt damages, squarely embraced by the Michigan Court of Appeals, are unquestionably more remote than those sought by DCT for the decline in value of Utilase. See also Salamey v. Aetna Casualty & Surety Co., 741 F.2d 874, 877 (6th Cir. 1984)(Mich. law). The damages sought here arose naturally from the particular underlying breach in this case.

Alternatively, DCT's damages are also recoverable under Hadley v. Baxendale and its progeny because the kind of damages sought here were within the contemplation of the parties at the time of contracting, as that requirement has been interpreted in Michigan. The District Court erred by concluding that Olympic had to know in 1996 that DCT would be sold for a diminished value to Noble in 1997. Under this interpretation, the Court would only have found the damages recoverable if

Olympic could have seen into the future and known who would ultimately buy Utilase and how much would be paid. However, Michigan law requires only that Olympic "knew or had reason to know" at the time the contract was entered into, that if it breached the contract, the value of Utilase would decline.

In Lawrence v. Will Durrah & Assoc., 445 Mich. 1; 516 N.W.2d 43 (1994), the Michigan Supreme Court made clear that the parties need not have had actual knowledge that the breach will affect a specific collateral transaction at the time the contract was entered. Rather, if the parties have reason to know that damages of the type that eventually arise are likely to occur, the threshold has been met. This is true even if they have no actual knowledge of the details of the damages that eventually arise. In fact, Lawrence specifically addressed the "collateral transaction" issue:

> A similar distinction has been drawn with regard to lost profits stemming from "collateral" transactions in which some courts have employed more rigorous formulations of lack of foreseeability and absence of proximate cause as reasons to deny recovery. In Mohr v. Dix Mutual Co. Fire Ins. Co., 143 Ill.App.3d 989, 997; 97 Ill.Dec. 831, 493 N.E.2d 638 (1986), the Illinois Court of Appeals noted:

> When profits which are sought arise out of the breached contract, profits are considered an element of the contract and are presumed to have been within the contemplation of the parties. However, as in the instant case, where the profits sought arise out of a collateral transaction, the plaintiff must establish the damages with reasonable certainty and also show lost profits were within the contemplation of the parties at the time they entered the agreement.
>
> * * *
>
> The collateral transaction rule has vitality, but more as a principle of proximate cause than as an aspect of Hadley v. Baxendale. The courts properly see that liability for the consequences of a breach of contract must be cut off somewhere. A strict test of actual knowledge of the collateral transaction . . . goes too far, however. . . . A reasonable test would require plaintiff to show only that defendant knew or should have known, from the nature of the transaction, that plaintiff would enter collateral transactions based upon it of the

> type actually entered. If this was foreseeable, then it is reasonable to hold defendant liable for plaintiff's losses. [Dunn, Recovery of Damage for Lost Profits (3rd ed.), 1.17, pp 48-49.]

Lawrence, 445 Mich. at 8, n 8; 516 N.W.2d at 46, n. 8. (Emphasis added.)

Therefore, under Lawrence, if a plaintiff's evidence shows that, from the nature of the underlying transaction, the defendant knew or should have known that the plaintiff would enter collateral transactions of the type the plaintiff actually entered, this is sufficient to state a prima facie case. Lawrence, 445 Mich. at 8, n. 8; 516 N.W.2d at 46, n. 8. Importantly, the plaintiff need not show that the specific details of the transaction were within the contemplation of the parties, if the type of transaction is reasonably evident from the nature of the underlying transaction. In other words, the parties need not know the names of the parties involved or the amount or extent of the likely loss; they must know simply that a loss of this type is foreseeable. See also Mohr v. Dix Mut'l County Fire Ins. Co., 143 Ill. App.3d 989, 997; 493 N.E.2d 638, 644 (1986) (finding that a fact question existed as to whether the possibility of lost profits was within the parties' contemplation when the contract was agreed to, and noting that the key issue was the foreseeability of the lost profits, not whether the parties

knew the identity of the entity to whom the profits were lost).

The evidence that DCT presented here is sufficient to show that, at the time it entered into the Non Solicitation Agreement with DCT, Olympic was aware that DCT would be attempting to sell Utilase. Olympic's CEO admitted that he knew, when the contract was signed, that its purpose was to protect Utilase from loss of valuable employees such as Mr. Williamson; that DCT intended to sell Utilase; and that DCT was engaged in negotiations for the sale of Utilase with other potential buyers. Therefore, the potential decline in value of Utilase was within the contemplation of the parties at the time of contracting. Under Lawrence, it does not matter that Olympic was unaware that Noble would be the eventual purchaser. There was ample evidence to show that Olympic knew or should have known that DCT would lose money by trying to sell Utilase to any entity after Mr. Williamson was removed by Olympic in violation of its Agreement.

ARGUMENT 3

There is No Impediment to Recovery of Damages for Diminution in Corporate Value

A party such as DCT may recover damages based on the diminution of its corporate value. See Windsor Shirt Co. v. New Jersey Nat'l Bank, 793 F.Supp 589 (E.D. Pa. 1992), aff'd, 989 F.2d 490 (3d. Cir. 1993); Aardvark Art, Inc. v. Lehigh/Steck-Warlick, Inc., 212 Ill.App.3d 492; 572 N.E.2d 472 (1991). See also Collins v. Ralston Purina Co., 147 F.3d 592, 594 (7th Cir. 1998) (discussing steps necessary "[t]o discourage key employees from seeking job opportunities elsewhere — a prospect that could diminish the company's market value") (emphasis added).

The most significant case recognizing damages for diminution in corporate value arising from a breach of contract is Windsor Shirt Co. v. New Jersey Nat'l Bank, 793 F.Supp 589 (E.D. Pa. 1992), aff'd, 989 F.2d 490 (3d. Cir. 1993), where the defendant bank called a loan agreement shortly before it was due to expire, thereby forcing the plaintiff business to liquidate its inventory. The case went to a jury on plaintiff's breach of contract claim in which plaintiff sought damages for the diminution in value of the company caused by defendant's breach of the loan agreement. Counsel for plaintiff presented

evidence that the plaintiff company was worth $7 to 9 million in early 1989, and sold for only two dollars early in 1990. The jury returned a verdict for $3.5 million. Windsor Shirt Co, 793 F.Supp at 594.

The defendant bank moved for judgment notwithstanding the verdict on the grounds that "[p]laintiff did not offer any proof that the Bank's breach caused anything other than nominal damage to Windsor." Windsor Shirt Co, 793 F.Supp at 596. The Court then moved to the heart of the dispute:

> The Bank argues that Plaintiff must do more than show that on one day Windsor was worth $3.5 million and then, within a month, it was worth almost nothing. The Bank argues, in fact, that Windsor must show how the Bank's breach caused Windsor's value to drop: After all, argued the Bank in court, the only significant effect of the breach was that Windsor had to give the Bank $3.5 million a month early.

Windsor Shirt Co, 793 F.Supp at 599.

The Court agreed that the plaintiff company had to show some evidence of a causal connection, but the Court rejected the Bank's argument that plaintiff's damages had to be established by "evidence of profits, sales and losses

and overall performance. . . both before and after the November 27 - December 1, 1989 actions by the Bank." Rather, the Court applied the traditional test that the plaintiff had to supply a reasonable quantity of information from which the jury could determine damages without regard to conjecture. Windsor Shirt Co, 793 F.Supp at 599-601. The Court found this test to be especially appropriate when the damages arose as a result of a single act, rather than from repeated actions over a course of years. Windsor Shirt Co, 793 F.Supp at 599. The Court ultimately concluded that, "[t]he Bank's argument that unless Windsor provided proof based on an analysis of a decline in Windsor's 'general operations, profits or sales,' it did not provide sufficient proof of damages is simply wrong." Windsor Shirt Co, 793 F.Supp at 601. The jury verdict was allowed to stand.

Another important case recognized that damages for diminution in value of a business resulting from a breach of contract are legally cognizable is Aardvark Art, Inc. v. Lehigh/Steck-Warlick, Inc., 212 Ill.App.3d 492; 572 N.E.2d 472 (1991). There, following a breach of contract, the plaintiff art dealer sued defendant for two types of damages: diminished value of the company and loss of future profits.[4] The trial court instructed the jury

---

[4] In Aardvark, the plaintiff art company contracted with a printing company to print a catalog of

that the plaintiff's recovery was limited to the diminished value of the company, and denied defendant's motion for a directed verdict on the diminution of value damages. The ruling was implicitly upheld on appeal, although errors in the "lost profits" damages analysis required a retrial on damages. Nonetheless, Aardvark unambiguously recognized that diminution in value of a company is an appropriate measure of damages where it results from breach of contract. Importantly, that case left the determination of the amount of damages to the jury and did not focus -- as the District Court improperly did

---

plaintiff's original art and thereafter to print the actual pieces to be supplied to purchasers from the catalog. Both tasks required the printer to make color "separations" for each piece of original art. When plaintiff complained about the quality of defendant's work and refused to make full payment, defendant refused to return plaintiff's "separations." Plaintiff sued for breach of contract, seeking approximately $550,000 for the diminished value of Aardvark, and $2.8 million for lost future profits. The jury returned a verdict for $1,695,833. On appeal, the printer did not allege error as to any of the rulings regarding the diminished value of Aardvark. Rather, the printer alleged error only as to the lost profits issues. However, because the evidence of the two types of damages were intertwined, the appellate court remanded for a new trial on damages.

here -- on whether there was sufficient proof of all damages claimed (i.e., $15 million).

Both Windsor Shirt Co and Aardvark make clear that a business can recover damages for the reduction in its value resulting from a defendant's breach of contract. In Windsor Shirt Co, it was foreseeable that a bank calling a commercial customer's loan before it is due would cause a decrease in the value of that commercial entity. Similarly, in Aardvark, it was foreseeable that a printer's failure to return the crucial "separations" to the plaintiff art company would have a devastating effect on the art company's ability to fulfill its obligations to ship copies of art prints to its customers. In the same vein, here, it was foreseeable that Olympic's solicitation and hiring of Chief Engineer Mark Williamson -- the "number two man" who knew everything about Utilase's highly competitive business -- would cause a decline in the value of Utilase.

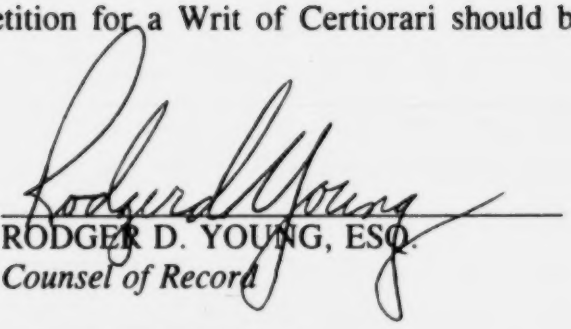
The District Court erred by concluding that the type of damages sought by DCT here were not recoverable as a matter of law.

CONCLUSION

The Court of Appeals' decision so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court as to call for the exercise of this Court's supervisory power. S.Ct.R. 10(a). DCT specifically drafted, and insisted that Olympic sign, a Non Solicitation Agreement to protect DCT from losing its employees. DCT required its key employees to sign Confidentiality Agreements. As soon as DCT learned of the breach, it sued Olympic to keep Olympic from benefitting at DCT's expense, as a result of the breach. Therefore, DCT took every reasonable step to prevent Olympic from causing injury to DCT. Yet, Olympic wilfully breach the Agreement and now claims that it should be able to do so with impunity.

Here, DCT presented sufficient evidence of a causal link between the breach and the resulting decline in value; it established that the damages sought were foreseeable within the meaning of Hadley v. Baxendale and its progeny; and contrary to the District Court's Order (as affirmed by the Sixth Circuit Court of Appeals) there is no impediment to awarding the type of damages sought here. Permitting Olympic to escape liability for the consequences of its calculated raid would set a dangerous precedent for other parties conducting due diligence reviews.

The Petition for a Writ of Certiorari should be granted.



RODGER D. YOUNG, ESQ.
Counsel of Record

TERRY WUESTER MILNE
Young & Associates, P.C.
26200 American Drive, Suite 305
Southfield, MI 48034
(248) 353-8620

Attorneys for Petitioners

APPENDIX A

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed September 6, 2000]

No. 99-1769

DCT, INC., a Michigan Corp. and)
UTILASE, INC., a Michigan Corp.,)
Plaintiffs-Appellants,)
vs.)
OLYMPIC STEEL, INC.,)
Defendant-Appellee ,)
)

Appeal from the United States District Court for the Eastern District of Michigan

Before: KENNEDY and NORRIS, Circuit Judges, and KATZ, District Judge.[1]

MEMORANDUM OPINION

PER CURIAM:

[1]The Honorable David A. Katz, United States District Judge for the Northern District of Ohio, sitting by designation.

Plaintiffs, DCT, Inc., and Utilse [sic], Inc., appeal from an order of the district court granting summary judgment to defendant, Olympic Steel, Inc., in their lawsuit alleging conduct by defendant that threatened the confidentiality of their trade secrets.

Having had the benefit of oral argument and having carefully considered the record on appeal, the briefs of the parties, and the applicable law, we are not persuaded that the district court erred in granting summary judgment to defendant.

Because the reasoning which supports judgment for defendant has been articulated by the district court, the issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the judgment of the district court is affirmed upon the reasoning employed by that court in its orders filed on July 13, 1998 and May 6, 1999.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
[Filed May 5, 1999]
No. 97-CV-60209-AA
Hon. Barbara K. Hackett

DCT, INC., a Michigan Corp. and)
UTILASE, INC., a Michigan Corp.,)
Plaintiffs,)
vs.)
OLYMPIC STEEL, INC.,)
Defendant.)
)

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (LIABILITY ONLY) AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON COUNT I (BREACH OF CONTRACT)

In the above captioned case, plaintiffs allege that defendant breached a non-solicitation agreement by pursuing and then hiring Utilase, Inc.'s chief engineer Mark Williamson. Now before the court is plaintiffs' motion for partial summary as to liability on their breach of contract claim (Count I), and defendant's motion for summary

judgment on Count I. For the following reasons, plaintiffs' motion shall be denied, and defendant's will be granted.

I. FACTS

Plaintiff Utilase, Inc. (Utilase) and defendant Olympic Steel, Inc. (Olympic) are business adversaries in the highly competitive field of laser blank welding. However, in late 1995 and 1996, when Olympic was contemplating entry into the laser blank welding market, Utilase's former owner DCT, Inc. (DCT) agreed to discuss with Olympic the possibility of selling Utilase if Olympic would first agree to certain disclosure safeguards. Thus, on January 11, 1996, Olympic's CEO Michael Siegel signed an agreement promising to maintain the confidentiality of Utilase's proprietary information and to refrain from soliciting any Utilase employee for two years. DCT's vice president and general counsel also signed the agreement, which provides the basis for plaintiffs' breach of contract claim. Specifically at issue is the following clause:

> 8. During the period of two years commencing on the date hereof, [Olympic] shall not solicit or actively seek to solicit the services, as employee, consultant or otherwise, of any person who during such period is employed by DCT or [Utilase],

> whether or not such person would commit any breach of his contract of service in leaving such employment.

After the contract was signed, DCT provided Olympic with a memorandum that described Utilase in detail and contained confidential operational and financial information, such as DCT's debt situation.[1] Also included was a list of Utilase's key employees including Mark Williamson. Subsequently, Olympic representatives met Williamson when they toured Utilase.

The discussions between DCT and Olympic ultimately did not result in any deal. In fact, Olympic eventually entered into a rival laser blank welding joint venture with U.S. Steel. Consequently, DCT began negotiations regarding a possible purchase of Utilase by TWB, a company that was and is in the laser blank welding business.[2]

---

[1]In 1993 and 1994, DCT borrowed $36 million from the Detroit General Retirement System. By 1996, DCT still owed $34 million and was in default on the loan. DCT was therefore attempting to restructure and reduce its debt.

[2]TWB is the joint venture of Thyssen Steel, Inc. and Worthington Industries, Inc.

On or about August 1, 1996, for purchase purposes, TWB valued Utilase between $18-28 million, depending upon Utilase's 1997 projections. On August 16, 1996, TWB signed a letter of intent to purchase Utilase at a price of $20 million. Subsequently, in October of 1996, TWB submitted a revised offer to DCT to acquire Utilase for $17 million. Finally, in December of 1996, TWB decided to discontinue its negotiations with DCT regarding the purchase of Utilase.

Plaintiffs argue that from as early as August, 1996, Olympic had identified Mark Williamson as its favorite candidate for the position of laser blank welding manager and continued to pursue him with zeal until Williamson accepted Olympic's employment offer in October of 1996, thereby breaching the non-solicitation agreement. Plaintiffs insist that Williamson's departure negatively impacted their negotiations with TWB because TWB viewed Williamson as "possibly the most important in connection with the continuing operations and in the understanding of the technology of Utilase."

In order to reduce its debt to the Detroit General Retirement System (DGRS), DCT ultimately sold Utilase to Noble, Inc. on November 24, 1997, but for far less than it had anticipated.[3] DCT explains that prior to Williamson's

---

[3]Plaintiffs' expert calculated the present value of the Noble purchase price to be approximately $13.1

departure, it had reached a restructure agreement with DGRS whereby the first $10 million in proceeds from the sale of Utilase would be used as DCT's working capital. Of the remainder received, DGRS would be paid the next $5.8 million and 50 percent of all proceeds received above $15.8 million. All monies received by DGRS from Utilase would first pay down the preferred stock owned by DGRS. However, because the purchase by Noble realized a lesser amount than expected, and the initial cash payment took place almost one year later than plaintiffs had anticipated, plaintiffs contend:

> DCT was not able to pay down the preferred stock of DGRS and the line of credit to the same extent nor during the same time period as would have occurred had DCT been able to sell Utilase for its fair market value [alleged to be $28 million] prior to the departure of Mr. Williamson.

Accordingly, plaintiffs filed suit against Olympic. Count I of their complaint alleges that Olympic "repeatedly breached the [non-solicitation agreement] by soliciting Mr. Williamson in connection with employment opportunities at

---

million.

Olympic." Plaintiffs opine "that the economic loss as a result of Mr. Williamson's hiring by Olympic, including the loss of trade secrets and proprietary information, approximates $25.8 million." In reaching that figure, plaintiffs maintain that when Williamson left the company, Utilase was worth between $28-30 million, and that afterwards, when Williamson began working for Olympic, Utilase was sold to Noble for substantially less consideration. Thus, plaintiffs conclude:

> The damages to DCT as a result of the hiring of Mr. Williamson by Olympic include the present value of the difference in price between the fair market value of Utilase as of the time Mr. Williamson discontinued his employment with Utilase and the amount actually paid by Noble. In addition, at approximately the same time Mr. Williamson left the Company, DCT was negotiating a restructuring with the General Retirement System of the City of Detroit ("GRS"), which had loaned the Company $34 million. As a result of the loss in fair market value of Utilase at the time Mr. Williamson resigned, DCT has additionally incurred substantially more in dividend costs and interest expense on

its restructured preferred stock with the GRS and higher line of credit balances with its bank.

Now before the court are the parties' cross motions for summary judgment as to Count I. In their motion, plaintiffs argue that the record clearly demonstrates Olympic's solicitation of Williamson and thus its breach of contract. On the other hand, defendant contends that it did not solicit Williamson in violation of its agreement with plaintiffs because it was Williamson who initiated the contact with Olympic. In support of its position, defendant explains that only two witnesses - David Lenzi and Williamson - have direct knowledge of the contacts between Olympic and Williamson, and both have testified that Williamson first approached Lenzi about a position at Olympic. Defendant thus concludes that the facts do not establish solicitation by Olympic because Olympic took no affirmative action to contact Williamson. For this reason, defendant argues that plaintiffs' motion should be denied, and summary judgment should be granted in defendant's favor as to plaintiffs' breach of contract claim.

Alternatively, defendant argues in its motion for summary judgment that plaintiffs have no actionable claim for breach of contract because they cannot establish a causal link between their losses and Olympic's alleged breach.

Furthermore, defendant contends that plaintiffs' claimed damages do not arise naturally from Olympic's employment of Williamson, nor were they reasonably in the contemplation of both parties as a probable result of a breach at the time the contract was made.

On April 15, 1999, the court heard arguments on the parties' pending motions. After careful consideration, the court determines that plaintiffs' motion for partial summary judgment on the liability issue must be denied because facts remain in dispute as to who initiated the contact between Williamson and Olympic, and when. Credibility of the witnesses is for the fact finder to assess, not the court. Regarding defendant's motion for summary judgment on Count I (breach of contract), the parties stated on the record that they would rely on their briefs, to which the court now turns.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) empowers the court to render summary judgment "forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See F.D.I.C. v. Alexander, 78 F.3d 1103, 1106 (6th Cir. 1996). The Supreme Court has affirmed the court's use of summary judgment as an

integral part of the fair and efficient administration of justice. The procedure is not a disfavored procedural shortcut. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); see also Kutrom Corp. v. City of Center Line, 979 F.2d 1171, 1174 (6th Cir. 1992).

The standard for determining whether a summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Winningham v. North Am. Resources Corp., 42 F.3d 981, 984 (6th Cir. 1994) (citing Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1310 (6th Cir. 1989)). The evidence and all inferences therefrom must be construed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Enertech Elec., Inc. v. Mahoning County Comm'r, 85 F.3d 257, 259 (6th Cir. 1996); Wilson v. Stroh Co., Inc., 952 F.2d 942, 945 (6th Cir. 1992). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); see also Hartleip v. McNeilab, Inc., 83 F.3d 767, 774 (6th Cir. 1996).

If the movant establishes by use of the material specified in Rule 56(c) that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law, the opposing party must come forward with "specific facts showing that there is a genuine issue for trial." First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 270 (1968); see also Adams v. Philip Morris, Inc., 67 F.3d 580, 583 (6th Cir. 1995). Mere allegations or denials in the non-movant's pleadings will not meet this burden. Anderson, 477 U.S. at 248. Further, the non-moving party cannot rest on its pleadings to avoid summary judgment. It must support its claim with some probative evidence. Kraft v. United States, 991 F.2d 292, 296 (6th Cir.), cert. denied, 510 U.S. 976 (1993).

III. DISCUSSION

Damage is a necessary element of an action for breach of contract under Michigan law. See, e.g., Davis v. Kramer Bros. Freight Lines, Inc., 361 Mich. 371, 376, 105 N.W.2d 29, 32 (1960). Therefore, plaintiffs' prima facie case for Count I must not only establish a breach, but also damages resulting from that breach. See, e.g., Shippey v. Madison Dist. Pub. Sch., 55 Mich. App. 663, 668, 223 N.W.2d 116, 119 (1974); see also Home Ins. Co. v. Commercial Indus. Sec. Serv., Inc., 57 Mich. App. 143, 225 N.W.2d 716 (1974) (affirming judgment for defendant where plaintiff failed to

establish that destruction of building was result of breach of contract due to absence of security guard).

Here, Olympic argues that even assuming a breach of the non-solicitation agreement, plaintiffs have failed to come forward with any proof that they suffered damages as a result of the breach. Moreover, Olympic states: "In fact, Utilase's decision to employ Mr. Williamson on an at-will basis flies in the face of any suggestion that his value to the company exceeded $25 million." The court agrees.

Plaintiffs maintain that Williamson's "defection reduces Utilase's value . . . [by] doom[ing] the purchase of Utilase by TWB." However, the record belies that assertion. Peter Klisares, former Executive Vice President of Worthington Industries, Inc., was one of the individuals who led the negotiations with DCT for the purchase of Utilase. He testified that although TWB initially offered $20 million in August of 1996, to acquire Utilase, by December of 1996, TWB was unwilling to pay more than $14 million, leaving the parties about $6 million apart. According to Klisares, the "bottom line" for the drop in price was that Utilase's net sales forecasts continued to drop throughout the due diligence period, and Utilase would not stand behind its forecasts. In fact, Klisares unequivocally stated that TWB would not have paid any more for Utilase even if Williamson had remained working there. Furthermore, Bronce Henderson, III,

Chairman of DCT, confirmed that plaintiffs told TWB they would not accept any amount less than the original price of $20 million. Thus, the uncontradicted testimony establishes that TWB was unwilling to offer a sufficient price for Utilase, with or without Williamson, and neither TWB's belief that Williamson was a "key employee" nor that his departure was "a negative" changes that fact.

Similarly, plaintiffs cannot prove their theory that the price Noble ultimately paid for Utilase was demonstrably less than it would have been had Olympic not breached its contract by soliciting Williamson. The only evidence proffered in support of plaintiffs' argument is the affidavit of Robert Skandalaris, Chief Executive Officer of Noble, stating: "Noble would have been willing to pay more than it did for Utilase if Noble had had some assurance that Utilase's confidential information would not have been made available to a Utilase competitor." However, nothing suggests that but for Williamson's departure, Utilase's alleged confidential information would have remained intact at the time of its sale. Moreover, Williamson had no employment contract with Utilase and was free to leave at any time. Even this court's injunction prohibiting Williamson from disclosing confidential information for a period of one year expired before the Noble purchase was finalized. Accordingly, plaintiffs have failed to establish that Olympic's purported

breach of the non-solicitation agreement proximately caused them to suffer any damages.

In addition to plaintiffs' inability to demonstrate a causal link between Olympic's supposed breach and the alleged damages, plaintiffs' requested damages are not recoverable as a matter of law. "[T]he damages recoverable for breach of contract are those that arise naturally from the breach and were within the contemplation of the parties at the time the contract was executed." Parmet Homes, Inc. v. Republic Ins. Co., 111 Mich. App. 140, 149, 314 N.W.2d 453, 457 (1981) (citing Kewin v. Massachusetts Mut. Life Ins. Co., 409 Mich. 401, 414, 295 N.W.2d 50, 52-53 (1980)). "Accordingly, in a commercial contract situation such as is involved here, application of this principle generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed under it." Held Constr. Co., Inc. v. Michigan Nat'l Bank of Detroit, 124 Mich. App. 472, 477, 335 N.W.2d 8, 10 (1983) (citing Kewin, 409 Mich. at 414-15 295 N.W.2d at 53) (affirming summary judgment in favor of defendant where plaintiff claimed that it had lost future profits when it was rendered insolvent by defendant's refusal to make payment as required by contract). Furthermore, "[u]nless the parties are both aware that a breach will affect a specific collateral enterprise, it cannot be said that the loss of profits from the other venture is within the

contemplation of the parties." Parmet Homes, 111 Mich. App. At 150, 314 N.W.2d at 458.

In this case, the damages sought by plaintiffs do not flow naturally from Olympic's alleged breach of the non-solicitation agreement. Had Utilase replaced Mark Williamson, the costs of replacing him would have resulted directly from Olympic's breach of the contract. However, the defection of a single at-will employee does not ordinarily give rise to $25.8 million in damages consisting of a $15 million reduction in value to the corporate employer and a $10 million increase in borrowing costs. Clearly, plaintiffs' claimed losses are not a consequence arising naturally from the alleged breach.

In addition, plaintiffs' alleged damages were not within the contemplation of the parties at the time they executed their agreement. Plaintiffs argued that DCT was engaged in a general effort to sell Utilase, and that Olympic should have known a future sale would be more difficult without Williamson. However, as held in Parmet Homes, 11 Mich. App. at 150, 314 N.W.2d at 458, "[u]nless the parties are both aware that a breach will affect a specific collateral enterprise, it cannot be said that the loss of profits from the other venture is within contemplation of the parties" (emphasis added). It is undisputed that when Olympic and

DCT signed the non-solicitation agreement, neither knew about the prospective sale of Utilase to TWB or Noble.

> The purpose of damages for breach of contract is to put the plaintiff in the same position as he would have been in had the defendant kept his contract. The injured party is not entitled to be placed in a better position than he would have been in had the contract not been broken.

Id. at 150-51, 314 N.W.2d at 458. Here, plaintiffs seek damages based on a sale price for Utilase they could only speculate they would be able to attain at the time the non-solicitation agreement was executed. Nevertheless, plaintiffs contend that Olympic should have contemplated the eventual inability of DCT to achieve that price from then unknown potential purchasers. An award of damages under these circumstances is not supported by Michigan law and, in effect, would result in a windfall to plaintiffs.

IV. CONCLUSION

For the reasons stated above,

IT IS ORDERED that plaintiffs' motion for partial summary judgment (liability only) hereby is DENIED.

IT IS FURTHER ORDERED that defendant's motion for summary judgment on Count I (breach of contract) hereby is GRANTED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
[Filed May 5, 1999]
No. 97-CV-60209-AA
Hon. Barbara K. Hackett

DCT, INC., a Michigan Corp. and)
UTILASE, INC., a Michigan Corp.,)
Plaintiffs,)
vs.)
OLYMPIC STEEL, INC.,)
Defendant.)

JUDGMENT

In accordance with the court's orders granting defendant's motion for summary judgment entered on July 13, 1998, and May 5, 1999, and the stipulated order dismissing Count IV of plaintiffs' complaint entered on December 1, 1998,

IT IS ORDERED AND ADJUDGED that judgment hereby is GRANTED in favor of defendant as to Counts I, II, III and V of plaintiffs' complaint.

Dated at Ann Arbor, Michigan, this 5th day of May, 1999.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
[Filed May 28, 1999]
No. 97-CV-60209-AA
Hon. Barbara K. Hackett

DCT, INC., a Michigan Corp. and)
UTILASE, INC., a Michigan Corp.)
Plaintiffs,)
vs.)
OLYMPIC STEEL, INC.,)
Defendant.)

ORDER DENYING MOTION FOR RECONSIDERATION

Plaintiffs have filed a motion for reconsideration of the court's May 5, 1999, order granting defendant's motion for summary judgment on Count I (breach of contract). Local Rule 7.1(g)(3) provides:

> Generally, and without restricting the court's discretion, the court will not grant motions for rehearing or reconsideration that merely

> present the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the court and the parties have been misled but also show that correcting the defect will result in a different disposition of the case.

The court finds that the motion simply reiterates earlier arguments that have been previously addressed and/or considered. Plaintiffs have failed to raise a palpable defect by which the court has been misled or show that a different disposition must result. Therefore, plaintiffs' motion for reconsideration is hereby DENIED.

SO ORDERED.

(2)

Supreme Court, U.S.
FILED
JAN 3 2001
CLERK

No. 00-941

IN THE
SUPREME COURT OF THE UNITED STATES
_____ Term, 2001

DCT, INC. AND UTILASE, INC.,
Petitioners,

v.

OLYMPIC STEEL, INC.,
Respondent.

Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

BARRIS, SOTT, DENN & DRIKER, P.L.L.C.
Sharon M. Woods
Counsel of Record for Respondent Olympic Steel, Inc.
211 W. Fort Street, 15th Floor
Detroit, Michigan 48226-3281
(313) 965-9725

KAHN, KLEINMAN, YANOWITZ & ARNSON
Michael Diamant, Esq.
Counsel for Respondent Olympic Steel, Inc.
Suite 2600 Erieview Tower
1301 East 9th Street
Cleveland, Ohio 44114
(216) 696-3311

YOUNG & ASSOCIATES, P.C.
Rodger D. Young
Counsel of Record
Terry Wuester Milne
Counsel for Petitioners DCT, Inc. and Utilase, Inc.
22600 American Dr., Suite 305
Southfield, Michigan 48034
(248) 353-8620

123 pp

QUESTION PRESENTED

Should a writ of certiorari be granted when the only issue is whether the U.S. District Court and the U.S. Court of Appeals for the Sixth Circuit, in affirmance, correctly construed the Michigan law of contractual damages by following the Michigan Supreme Court and the Michigan Court of Appeals?

PARTIES TO THE PROCEEDING

Petitioners

The Petitioners and Plaintiffs below are DCT, Inc., the corporate parent, and Utilase, Inc., a wholly owned subsidiary of DCT, Inc. at all times relevant to these proceedings. Noble International, Ltd., has never been (nor could it be) a party to these proceedings.

Respondent

The Respondent and Defendant below is Olympic Steel, Inc., a former prospective purchaser of Utilase, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

INDEX OF AUTHORITIES v

OPINIONS BELOW vii

JURISDICTION vii

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED vii

I. STATEMENT OF THE CASE 1

II. ARGUMENT FOR DENYING WRIT 6

ARGUMENT 1
DCT Presented No Evidence of a Proximate Causal Link Between Olympic's Alleged Breach and the Alleged $15.0 Million Diminution in the Value of Utilase 10

ARGUMENT 2
Apart from the Absence of Proximate Cause, DCT's Claim of Damages Based Upon the Alleged Diminution of the Value of Utilase Does Not Meet the *Hadley v. Baxendale* Test Applied Under Michigan Law for Collateral Sales Transactions 15

ARGUMENT 3
Cases from Other Jurisdictions Allowing Damages for a Diminution in Corporate Value Are Irrelevant 20

III. CONCLUSION 21

INDEX OF AUTHORITIES

Cases **Page(s)**

Allen v. Owens-Corning Fiberglas Corp.,
225 Mich. App. 397, 571 N.W.2d 530 (1997) 11

Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) 7

Aardvark Art, Inc. v. Lehigh/Steck-Warlick, Inc.,
212 Ill. App. 3d 492, 572 N.E.2d 472 (1991) 20

Browning-Ferris Industries of Vermont, Inc.
v. Kelco Disposal, Inc., 492 U.S. 257,
109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989) 6

Celotex Corp. v. Catrett, 477 U.S. 317,
106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) 7

Collins v. Ralston Purina Co.,
147 F.3d 592 (7th Cir. 1998) 20

Erie Railroad Co. v. Tompkins, 304 U.S. 64,
58 S. Ct. 817, 82 L.Ed. 1188 (1938) 6

Hadley v. Baxendale, 9 Exh. 341,
156 Eng. Rep. 145 (1854) 15

Hanna v. Plummer, 380 U.S. 460,
85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965) 6

Lawrence v. Will Darrah & Associates,
445 Mich. 1, 516 N.W.2d 43 (1994) 17-18

Mulholland v. DEC Int'l Corp.,
432 Mich. 395, 443 N.W.2d 340 (1989) 11-12

Parmet Homes, Inc. v. Republic Ins. Co.,
111 Mich. App. 140,
314 N.W.2d 453 (1981) 9, 15-19

Skinner v. Square D Co., 445 Mich. 153,
516 N.W.2d 475 (1994) 11

Wetmore v. Pattison, 45 Mich. 439,
8 N.W. 67 (1881) 9, 16, 18-19

Windsor Shirt Co. v. New Jersey Nat'l Bank,
793 F. Supp. 589 (E.D. Pa. 1992),
aff'd, 989 F.2d 490 (3rd Cir. 1993) 20

Statutes

28 U.S.C. § 1332(a)(1) 7

Court Rules

Fed.R.Civ.P. 56 ..... 7, 21

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit affirmed without opinion the decision of the U.S. District Court for the Eastern District of Michigan. The Opinion of the District Court was not published, and is included in App. E.

JURISDICTION

Jurisdiction in the court of first instance, the U.S. District Court for the Eastern District of Michigan, was based solely on diversity of citizenship under 28 U.S.C. §1332(a)(1) (citizens of different states).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

None. The issues on appeal arise solely out of state law.

I. STATEMENT OF THE CASE

This is a diversity action in which only state law is, or ever has been, at issue. The action arises out of the decision of Mark Williamson to leave his employment as Chief Engineer with Utilase, Inc. ("Utilase"), a subsidiary of DCT, Inc. ("DCT"), and join Olympic Steel, Inc. ("Olympic"). Contrary to the statement in its Petition for a Writ of Certiorari, DCT did not immediately sue Olympic. DCT (through its subsidiary, Utilase) instead sued Williamson, alleging that he breached a confidentiality agreement with Utilase by disclosing proprietary technical information to Olympic. DCT obtained a preliminary injunction against Williamson, which the U.S. District Court refused to extend. The District Court instead dismissed the action against Williamson, explaining that DCT ultimately pointed to "no evidence whatsoever from which a jury could conclude that Defendant used or disclosed a specific protectable trade secret," but instead relied on "speculation and hope that it could dupe a jury into finding a misappropriation." (App. G, p. 2.)

The U.S. Court of Appeals for the Sixth Circuit affirmed the dismissal of the *Williamson* case and DCT did not seek further relief in this Court. (App. H.) Instead, DCT filed this suit against Olympic, alleging a variety of state law claims. The U.S. District Court granted summary disposition on all of those claims and, again, the Sixth Circuit affirmed.

DCT's Petition for a Writ of Certiorari is based upon the lower courts' dismissal of DCT's Count I claim for breach of

contract arising out of an alleged nonsolicitation agreement executed by Olympic. Olympic executed the agreement on or about January 11, 1996 in connection with its due diligence as a prospective purchaser of Utilase. The term of the contract was two years from the date of execution (January 11, 1996 - January 11, 1998). DCT essentially alleged that Olympic breached the contract by soliciting a "key" Utilase employee (Williamson) during that two-year period. (App. A, ¶¶ 12, 15, 19-25.)

DCT did not claim direct damages based upon the replacement of Williamson, who was an at-will employee with a salary of $85,000. Instead, DCT claimed a diminution in the corporate value of Utilase from $28.0 Million to $13.1 Million.

Apart from the inherent incongruity in a claim that the resignation of a single at-will employee could result in some $15.0 Million loss in corporate value,[1] both courts below observed a lack of evidence to support DCT's claim that Utilase was worth $28.0 Million. DCT attempted to support that figure by relying on its negotiations between August and December of 1996 for the sale of Utilase to "TWB" (Tailored Welded

---

[1] Although DCT asserts that Williamson was "at the helm" of Utilase, the C.E.O. of Utilase was actually John Baysore who, like Williamson, was a welding engineer from the Ohio State University program. Williamson was not an officer of Utilase, but simply held the title of "Chief Engineer."

Blanks), a joint venture of Thyssen, Inc. and Worthington Industries, Inc. As the District Court observed, Mr. Klisares handled the negotiations for Worthington/TWB. Klisares testified that TWB initially valued Utilase at $18.0-28.0 Million and entered a letter of intent to purchase at $20.0 Million, contingent upon Utilase's 1997 sales projections. (App. B, p. B2, App. C, ¶ 6.) TWB later reduced its offer to $18.5 Million, then to $17.0 Million when Utilase's 1997 sales projections fell. (App. B, p. B2-B3.) When Utilase's sales projections fell again, TWB was unwilling to pay more than $14.0 Million (App. B, pp. B6-B7), but did not actually make the offer because DCT's chairman told Klisares not to bother with an offer of less than $17.0 Million. (App. B, pp. B6-B7.)

Klisares did testify that the $14.0 Million value finally placed on Utilase by TWB was due to a number of factors, including Utilase's personnel. (App. B, pp. B8-B9.) However, he flatly denied that TWB would have valued Utilase at more than $14.0 Million if Williamson had remained an employee. *Id.* Similarly, Walter Oehler, the C.F.O. of Thyssen, Inc., executed an affidavit stating that TWB viewed Williamson's loss "as a negative in the business operations of Utilase," but he did *not* attest to any higher offer that TWB would have made for Utilase if Williamson had remained a Utilase employee. (App. C, ¶ 10.)[2]

---

[2] The affidavit of Walter Oehler is apparently what DCT refers to in its footnote 2 as evidence of TWB's "withdrawal due to

DCT's damages were therefore based on a "prospective" sale that DCT would not close at *less* than $17.0 Million and TWB would not close at *more* than $14.0 Million. There was *no* evidence that Williamson's continued employment at Utilase could not have closed that financial gap. The District Court explained: "Thus, the uncontroverted testimony establishes that TWB was unwilling to offer a sufficient price for Utilase with or without Williamson, and neither TWB's belief that Williamson was a 'key employee' nor that his departure was viewed as 'a negative' changes that fact." (App. E, p. E9.)

The District Court also rejected DCT's theory of damages based upon the sale of Utilase to Noble International, Ltd., which occurred still later, on November 24, 1997. That theory was based upon the affidavit of Robert Skandalaris, Noble International's C.E.O., that Williamson's departure from Utilase resulted in a loss of "confidential information" and an unspecified reduction in Noble International's offer. (App. D.)[3] The District Court pointed out, however, that

---

the breach by Olympic." The affidavit does not so state, nor does it contradict the more direct statement of Klisares.

[3] While it had no bearing on the lower courts' rulings, it may be useful to know that Noble International retained a financial interest (50% of the net proceeds) in this lawsuit as part of the purchase price. The fact that DCT based its damages on a $13.1 Million figure that was apparently discounted for the prospective value of this lawsuit, makes Mr. Skandalaris' affidavit

Williamson was an at-will employee, who could have left Utilase for any competitor at any time, and that even the District Court's prior one-year injunction on Williamson's disclosure of confidential information expired before the Noble International purchase was finalized. Thus, the District Court concluded: "Nothing suggests that, but for Williamson's departure, [to Olympic] Utilase's alleged confidential information would have remained intact." (App. E, p. 9.) In other words, there was also no evidence that Williamson's continued employment at Utilase could have closed the confidentiality gap claimed by Mr. Skandalaris.

Finally, the District Court observed that the ordinary and direct measure of damages for the alleged solicitation of Williamson was the cost to replace his services as an employee.[4] (App. E, p. 9.) DCT did not claim ordinary or direct damages, but instead claimed consequential damages based upon two collateral enterprises — the prospective sale of Utilase to TWB and the later sale of Utilase to Noble International. However, under Michigan contract law: "Unless the parties are aware that a breach will affect a *specific*

---

inherently suspect.

[4] There was also no evidence of record that Utilase actually replaced Williamson, or made any effort to do so. Moreover, contrary to claims in its Petition, DCT did not "immediately" sue Olympic for a breach of contract, but actually waited nine months before suing Olympic.

collateral enterprise, it cannot be said that the loss of profits from the other venture is within the contemplation of the parties." (App. E, p. 9 (emphasis in original)). Neither the future *prospective* sale to TWB, nor the future sale to Noble International were known to Olympic or DCT on January 11, 1996. Therefore, neither could have been within the *specific* contemplation of these parties.

The District Court thus concluded that, even if the jury found a "solicitation" by Olympic in violation of the contract, DCT's theories would not support a finding of damages that were proximately caused by the alleged solicitation. After carefully observing the standards for summary judgment, the District Court dismissed DCT's Count I Breach of Contract claim and further denied DCT's motion for reconsideration. The Circuit Court affirmed in an unpublished *per curium* opinion.

II. ARGUMENT FOR DENYING WRIT

There is a glaring absence in DCT's Petition of any meaningful federal issue. State substantive law applies in diversity actions. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L.Ed. 1188 (1938); *Hanna v. Plummer*, 380 U.S. 460, 465, 85 S. Ct. 1136, 1141, 14 L. Ed. 2d 8 (1965). More specifically, state law governs the measure of damages in diversity actions. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278-279,

109 S. Ct. 2909, 2921-2922, 106 L. Ed. 2d 219 (1989). Federal jurisdiction in this matter was based on diversity of citizenship, 28 U.S.C. § 1332(a)(1), and DCT's claim of error is that the lower court misapplied Michigan's law of contract damages.

DCT's federal "hook" is simply that the lower courts must have procedurally erred — misunderstood the standard for summary judgment — because they otherwise would have denied summary judgment to Olympic. There is, of course, another logical alternative: The lower courts were perfectly cognizant of the standards for summary judgment, properly applied Michigan contract law, and correctly observed that DCT was unable to proximately link the loss of one at-will employee to a diminution of $15.0 Million in the value of Utilase. Indeed, that logical alternative is compelling once this Court observes that the District Court properly recited the Fed.R.Civ.P. 56 standard of review under *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2509-2510, 91 L. Ed. 2d 202 (1986), while DCT continues to ignore or misrepresent the critical facts that drove the lower courts' decisions:

— Contrary to DCT's Petition, TWB did not "abruptly" break off negotiations for the purchase of Utilase "without explanation." The District Court correctly observed that TWB broke off negotiations when Utilase's sales projections continued to fall so that any offer above

DCT's bottom line of $17.0 Million was unwarranted. There was no contrary evidence. There was no evidence contradicting the testimony of TWB's Pete Klisares that TWB would not have paid more than $14.0 Million for Utilase even if Williamson had remained. In other words, Utilase's declining sales projections made a sale impossible with or without Williamson.

— Contrary to DCT's Petition, there is no evidence that TWB "abandoned its proposed purchase of Utilase because TWB believed that Mr. Williamson's laser blank welding knowledge was one of Utilase's key assets." Indeed, TWB's Klisares testified precisely to the contrary: TWB continued to negotiate with DCT for the purchase of Utilase with full knowledge of Williamson's departure, but eventually concluded that it was not worth more than $14.0 Million *with or without* Williamson.

— Contrary to DCT's Petition, Michael Siegal, Olympic's C.E.O., did *not* concede during his deposition that the purpose of the alleged nonsolicitation agreement was to prevent a reduction in the value of Utilase by solicitation of valuable employees. Mr. Siegal testified that the purpose was: "Just to prevent the entity from pursuing employees that they might meet during their due diligence

process."[5] (App. F, p. F2.) Mr. Siegal also testified that the possible purposes of the contract were "vast and wide" and when asked whether it was "possible" that they included protection of the value of Utilase, he testified: "It's certainly possible." (App. F, p. F3.) There was *no* testimony that damages flowing from future sales to TWB or Noble International were within his contemplation. There was *no* evidence that he believed that hiring Williamson, an at-will employee, actually diminished the value of Utilase.

There is, furthermore, no indication in the District Court's opinion that it misapplied Michigan's law of collateral contract damages. *Parmet Homes, Inc. v. Republic Ins. Co.*, 111 Mich. App. 140, 314 N.W.2d 453 (1981), and *Wetmore v. Pattison*, 45 Mich. 439, 8 N.W. 67 (1881), are squarely on point. There is also no evidence that the District Court misunderstood Michigan's requirement of proximate cause for contract damages: The issue was not whether there was more than one proximate cause, but whether there was any evidence that Williamson's departure was *a* proximate cause.

---

[5] Williamson contacted Olympic by phone after learning of the employment opportunity through a friend who had turned down the position at Olympic. Olympic moved for summary disposition on the theory that merely accepting Williamson's phone call was not a "solicitation," but the District Court ruled that there was a question of fact on that point.

DCT's Petition simply ignores or misrepresents the operative facts, misconstrues or misapplies Michigan law, then concludes that the District Court must have procedurally erred by reaching a different result. DCT's Petition presents no ground for relief from the Circuit Court's *per curium* affirmance.

ARGUMENT 1.

DCT Presented No Evidence of a Proximate Causal Link Between Olympic's Alleged Breach and the Alleged $15.0 Million Diminution in the Value of Utilase

DCT's principal theory of liability is that, but for the loss of one at-will employee, TWB would have purchased Utilase for $28.0 Million, rather than the $13.1 Million eventually paid by Noble International. The only other variation of DCT's damage theory is that, but for the loss of the same at-will employee, unspecified "confidential information" would have remained with Utilase and Noble International would have paid an unspecified sum above $13.1 Million for Utilase. The lower courts properly found that DCT failed to offer any evidence to support those damage theories and therefore failed to substantiate a *prima facie* claim for breach of contract.

DCT's Petition first argues that there can be more than one proximate cause of damages and that the lower courts improperly focused on only one — the rapidly declining value of Utilase as a result of declining sales projections. But that argument incorrectly assumes that there was evidence to support DCT's fundamental proposition that the loss of Williamson was *a* proximate cause of the diminution in the value of DCT. The lower courts did not make that assumption. The lower courts properly found that there was no evidence that Williamson's departure was a proximate cause of the alleged damages.[6]

Under Michigan law, proximate cause requires proof that the injury was a probable, reasonably anticipated and natural consequence of the defendant's negligence. *Allen v. Owens-Corning Fiberglas Corp.*, 225 Mich. App. 397, 401, 571 N.W.2d 530, 532-533 (1997). Proximate cause requires proof of "a logical sequence of cause and effect, notwithstanding other plausible theories." *Skinner v. Square D Co.*, 445 Mich. 153, 159-60, 516 N.W.2d 475, 478 (1994); *Mulholland v. DEC Int'l Corp.*, 432 Mich. 395, 415, 443 N.W.2d 340, 349 (1989). The test is whether there is a logical chain of events

---

[6] Olympic only assumes, *arguendo*, that Michigan contract law follows the tort principles of proximate cause, allowing liability when the defendant's breach was merely a proximate cause and not the sole or dominant factor in the injury. There is no Michigan authority, to Olympic's knowledge, that supports that proposition.

establishing that "but for" the breach, DCT would have reaped the benefit of those sales. *Mulholland,* 432 Mich. App. at 412-413, n. 12; 443 N.W.2d at 348. The issue squarely faced by the lower courts is what evidence linked Williamson's departure to a diminution in the offer of TWB or Noble International.

To support the claim that TWB's offer was diminished by Williamson's loss, DCT first offered the testimony of Pete Klisares, who represented Worthington/TWB in its negotiations for the purchase of Utilase. Klisares testified that DCT's Chairman told him that DCT would not accept less than $17.0 Million for Utilase and that, because of Utilase's declining sales projections, TWB eventually reduced its valuation of Utilase from the initial $18.0-$28.0 Million to a final valuation of $14.0 Million. (App. C, p. C2.) Mr. Klisares did testify that the $14.0 Million valuation of Utilase took into account the personnel of Utilase, but he flatly *denied* that TWB would have paid more than $14.0 Million if Williamson had remained with Utilase. (App. B, p. B8.) Thus, the lower courts were faced with a yawning gap of at least $3.0 Million in the logical sequence linking Williamson's departure to the loss of the TWB sale.

That logical gap was not bridged by what DCT now obliquely refers to as "an affidavit of one of the two TWB officers who structured the TWB offer." Petitioners' Brief, p. 7, n. 3. The other "TWB officer" was Walter Oehler, C.E.O.

of Thyssen, Inc., whose affidavit merely established that TWB viewed Williamson's departure as "a negative in the business operations of Utilase." (App. C, ¶ 10.) No doubt, Klisares felt the same way, but neither Klisares nor Oehler ever testified that TWB would have paid more than $14.0 Million for Utilase if Williamson had remained. In fact, Klisares flatly *denied* that TWB would have paid more for Utilase. (App. B, pp. 70-71.)

The lower courts also squarely faced DCT's claim that Noble International would have paid more for Utilase if Williamson had remained. Robert Skandalaris' affidavit (App. D), might have so stated, but instead merely asserted: "The fact that Mr. Williamson had left to join a competitor meant that Utilase's confidential information would be available in the marketplace." (App. D, ¶ 6.) The District Court carefully examined the Skandalaris affidavit and rejected DCT's theoretical causal link, reasoning:

> However, nothing suggests that but for Williamson's departure, Utilase's alleged confidential information would have remained intact at the time of its sale. Moreover, Williamson had no employment contract with Utilase and was free to leave at any time. Even this court's injunction prohibiting Williamson from disclosing confidential information for a period of one year expired before the Noble purchase was finalized. Accordingly, plaintiffs

> have failed to establish that Olympic's purported breach of the non-solicitation agreement proximately caused them to suffer any damages.

(App. F, pp. F9-F10.) The District Court was quite familiar with, and properly skeptical of, DCT's claims of "confidential information," having heard and decided DCT's prior motion for injunctive relief. As a result, the District Court was able to spot the logical gap in the Skandalaris affidavit — including the absence of any statement that Utilase would have maintained its alleged confidentiality, "but for" Williamson's departure.

Thus, the District Court thoughtfully and carefully considered the evidentiary support for DCT's alleged damages and found it woefully inadequate. The order of summary disposition of DCT's Breach of Contract claim was not only technically correct, but substantially satisfying: DCT had overreached by ignoring any possible direct damages and instead claiming only the most extraordinary consequential damages. $15.0 Million in damages for the loss of a single at-will employee is an extraordinary claim for which DCT ultimately had no evidence. The lower courts properly accounted for all evidence submitted by DCT. The lower courts properly recited and applied Michigan law. The lower courts correctly applied the federal standard for summary judgment motions. There is no substantial federal issue in this case. There is no ground for granting DCT's Petition.

ARGUMENT 2.

Apart from the Absence of Proximate Cause, DCT's Claim of Damages Based Upon the Alleged Diminution of the Value of Utilase Does Not Meet the *Hadley v. Baxendale* Test Applied Under Michigan Law for Collateral Sales Transactions

There are three basic problems with DCT's argument that the lower courts misconstrued the rule of *Hadley v. Baxendale*, 9 Exh. 341, 156 Eng. Rep. 145 (1854). First, the argument is irrelevant since DCT cannot establish proximate cause — a logical chain of events establishing that, but for Williamson's departure, Utilase would have sold for more. (See Argument 1, *supra.*) Second, DCT's argument raises only issues of substantive state law that do not warrant review by this Court. Third, DCT's argument is based solely on general principles of foreseeability — not on the specific prophylactic rule of Michigan law which generally precludes breach of contract damages for unidentified collateral transactions.

The leading Michigan case on this point, *Parmet Homes v. Republic Ins. Co.*, 111 Mich. App. 140, 314 N.W.2d 453 (1981), is not even discussed in DCT's argument. In *Parmet Homes*, the defendant breached a policy of life insurance on homes under construction by the plaintiff, Parmet Homes. Parmet Homes claimed that the defendant's failure to

make timely payments under its insurance policy resulted in a loss of capital that Parmet Homes would have used to participate in a joint venture with a lumber company that would have allowed Parmet Homes to build 163 additional homes. Parmet Homes claimed lost profits on that collateral transaction. The Michigan Court of Appeals affirmed dismissal of the claim, explaining:

> In cases where loss of profits has been awarded, the loss resulted directly from the nonperformance of the contract between the parties, not from the failure of another venture unknown to the defendant. See, *Lorenz, supra*, 611-612, and cases cited therein. *Unless the parties are both aware that a breach will affect a specific collateral enterprise, it cannot be said that the loss of profits from the other ventures is within the contemplation of the parties. Wetmore v Pattison*, 45 Mich 439; 8 NW 67 (1881). Since it is uncontested that defendants were not aware of the possible venture between Erb and plaintiff until well after the contract was entered into, it cannot be said that the loss of profits from the Erb contract was within the contemplation of these parties.

Parmet Homes, 111 Mich. App. at 150; 314 N.W.2d at 458 (emphasis supplied).

It does little good for DCT to argue *generally* that its damages "arose naturally" from the alleged breach or that they were generally within the "contemplation of the parties when the contract was executed." Whether or not those propositions are generally true, Michigan law more specifically does *not* allow lost profit damages resulting from collateral ventures unknown to the defendant at the time the contract was entered.

It also does little good for DCT to argue the exception carved out by the Michigan Supreme Court in *Lawrence v. Will Darrah & Associates*, 445 Mich. 1, 516 N.W.2d 43 (1994). The *Lawrence* decision merely extended the longstanding Michigan rule that casualty insurers may be liable for ordinary business losses when they fail to make timely payments under their policies. In *Lawrence*, the lost profits at issue were from hauling contracts which the plaintiff could not fulfill because the defendant insurer failed to make timely payments for the theft of the plaintiff's truck. The *Lawrence* plaintiff did not claim lost profits from a collateral transaction (*e.g.*, sale of his trucking business or a joint venture). Presumably, the *Lawrence* Court also would have denied the lost profits claimed in *Parmet Homes*. The *Lawrence* Court was aware of *Parmet Homes*, but did not overrule it.[7]

---

[7] *Parmet Homes* was cited by both the majority, 445 Mich. at 11, n. 11, 516 N.W.2d at 48, n. 11, as well as the dissent, 445 Mich. at 20, 516 N.W.2d at 51.

To read *Lawrence* more broadly is to suggest not only that the *Lawrence* Court was overruling *Parmet Homes sub silento*, but also that the Michigan Supreme Court was overruling its own precedent *sub silento*. *Parmet Homes* is, after all, expressly based on *Wetmore v. Pattison*, 45 Mich. 439, 8 N.W. 67 (1881). In *Wetmore*, the plaintiff claimed lost profits resulting from the defendant's failure to provide the number of saw-logs specified in their contract. The lost profits arose, however, from a later, collateral contract for a resale of the lumber to a car company. The *Wetmore* Court allowed damages only for the higher costs involved in Wetmore's "cover" by purchases of logs elsewhere. The Court explained:

> The logs were not contracted for on the strength of the lumber agreement. The latter had no existence when the former was entered into. The plaintiffs after having made their contract with the defendant were at liberty, no doubt, to embark in such enterprises as they thought proper on the strength of it. It was a question of business prudence how far it would be wise or safe to rely on the agreement with defendant. But they were not empowered to enter into such scheme or arrangement as they might choose, in reliance of his contract, and make him responsible in the event of his failure for whatever losses might happen through such

> secondary operations. *To hold otherwise would be to visit the failure of performance with an amount of liability not dependent on the contract, but on the conjectural possibilities of any scheme built upon the contract by the party to whom performance is due.* The damages for which one may be held liable in a contract of this nature, are such as flow directly from his own default, and which it is reasonable to suppose were within the contemplation of the parties on their entering into the contract.

Wetmore, 45 Mich. at 441, 8 N.W. at 68.

Clearly, either the *Parmet Homes* Court or the *Wetmore* Court, upon finding a breach, would have allowed damages to DCT based on the cost of cover — any additional wages paid to a similarly trained and experienced welding engineer. But DCT was not satisfied with direct damages. DCT instead claimed lost profits; not from Utilase's welding operations, but rather from the collateral sale of the business. The speculative or "conjectural" nature of those damages is amply illustrated in this case by the failure of DCT to provide any supporting evidence of a proximate causal link between the departure of Williamson and the loss of the TWB sale. (*See* Argument I.) But Michigan courts have gone further: They will simply not engage in this conjecture, nor will they allow speculation of this kind to be submitted to jury.

DCT's argument that the lower courts erred by dismissing its claim for lost profits based upon a collateral transaction is simply wrong. It does not raise any federal question and cannot provide any basis for relief, since DCT also failed to substantiate a proximate causal link between Williamson's departure and the alleged diminution in the value of Utilase. DCT's Petition properly should be denied.

ARGUMENT 3.

Cases from Other Jurisdictions Allowing Damages for a Diminution in Corporate Value Are Irrelevant

For reasons it has chosen not to share with this Court or Olympic, DCT has cited several cases from other jurisdictions for the proposition that diminution in corporate value may be recoverable as damages. See *Windsor Shirt Co. v. New Jersey Nat'l Bank*, 793 F. Supp. 589 (E.D. Pa. 1992), *aff'd*, 989 F.2d 490 (3rd Cir. 1993); *Aardvark Art, Inc. v. Lehigh/Steck-Warlick, Inc.*, 212 Ill. App. 3d 492, 572 N.E.2d 472 (1991); *Collins v. Ralston Purina Co.*, 147 F.3d 592, 594 (7th Cir. 1998). None of those cases is based on Michigan law and none contains any significant discussion of proximate cause or the collateral source rule. None of the cases cited by DCT has any bearing on the substantive or procedural issues alleged by DCT. None could possibly justify any relief from the decisions of the lower courts in this case.

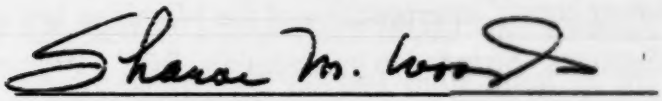
III. CONCLUSION

DCT's Petition states no significant federal issue, since it arose out of a diversity action and, more specifically, the lower courts' interpretation of the Michigan law of contractual damages. Stripped to its essentials, DCT's Petition claims that the lower courts must have procedurally erred — misinterpreting the standard of review for summary judgment — or they would not have dismissed DCT's Count I Breach of Contract Claim. But the lower courts did not misconstrue Fed.R.Civ.P. 56 or Michigan law. Indeed, they carefully and thoughtfully applied them. The lower courts simply found that DCT's proffered evidence of lost profits was insufficient to raise a genuine issue of material fact. Most disturbing, however, is the apparent strategy of DCT to continue to rely upon the same misrepresentations and omissions of fact in its current Petition that failed below. There was simply no evidence that the loss of a single at-will employee of DCT's subsidiary caused a reduction in the sale price from $28.0 Million to $13.1 Million. The claim is, at best, dubious on its face. As the lower courts quickly discovered, it is entirely unsupported upon close inspection of DCT's proofs.

A writ of certiorari to the United States Sixth Circuit Court of Appeals properly should be denied.

Respectfully submitted,

BARRIS, SOTT, DENN & DRIKER, P.L.L.C.

By: 

Sharon M. Woods
Counsel of Record
Counsel for Respondent Olympic Steel, Inc.
211 West Fort Street, 15th Floor
Detroit, Michigan 48226-3281
(313) 965-9725

KAHN, KLEINMAN, YANOWITZ & ARNSON
Michael Diamant, Esq.
Suite 2600 Erieview Tower
1301 East 9th Street
Cleveland, Ohio 44114
(216) 696-3311

Date: December 27, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DCT, INC., a Michigan corporation, and
UTILASE, INC., a Michigan corporation,

Plaintiffs,

v.

Case No. 97 CV 72148
Hon. ~

OLYMPIC STEEL, INC., an
Ohio corporation,

Defendant.

RODGER D. YOUNG (P22652)
STEVEN SUSSER (P52940)
Young & Associates, P.C.
Attorneys for Plaintiffs
26200 American Drive, Suite 305
Southfield, Michigan 48034
(810) 353-8620

A CIVIL ACTION BETWEEN THESE PARTIES OR OTHER PARTIES ARISING OUT OF THE TRANSACTION OR OCCURRENCE ALLEGED IN THE COMPLAINT HAS BEEN PREVIOUSLY FILED IN THE U.S. DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION. THE DOCKET NUMBER IS 97-CV-60001-AA, AND IT IS ASSIGNED TO JUDGE BARBARA HACKETT. THAT ACTION IS PENDING.

COMPLAINT

NOW COME Plaintiffs, DCT, Inc. ("DCT") and Utilase, Inc. ("Utilase"), by and through their attorneys, Young & Associates, P.C., and for their Complaint state as follows:

JURISDICTIONAL ALLEGATIONS

1. Plaintiff DCT is a Michigan corporation with its principal place of business in Detroit, Michigan. DCT is in the business of manufacturing components for the automotive industry.

2. Utilase is a Michigan corporation with its principal place of business in Detroit, Michigan. Utilase is a subsidiary of DCT. Utilase is in the business of using laser technology to weld sheet metal and designing and manufacturing engineering systems for complex welding processes.

3. Defendant Olympic Steel, Inc. ("Olympic") is an Ohio corporation with its principal place of business in Cleveland, Ohio. Olympic is in the business of buying and processing steel products.

4. This action is founded in diversity of citizenship jurisdiction, 28 U.S.C. 5 1332. The amount in controversy exceeds $75,000.00, exclusive of costs and interest.

5. Venue for this action is founded on 28 U.S.C. 5 1391.

GENERAL ALLEGATIONS

6. Plaintiffs reallege Paragraphs 1 through 5 as though each were fully set forth herein.

7. On January 11, 1996, Olympic signed an agreement ("Agreement"). DCT was the other party to the Agreement. [See January 11, 1996 Agreement, attached as Exhibit A].

8. At the time Olympic signed the Agreement, it was interested in purchasing Utilase.

9. Utilase performed laser blank welding.

10. Laser blank welding is a process for joining pieces of metal -- called blanks -- through the use of laser technology. The process has been developed and refined by Utilase over the past ten years. It is now becoming recognized as a highly successful means of high technology welding. Unlike traditional welding, laser blank welding can join pieces of metal of varying thickness in a precise, secure bond.

11. DCT insisted that Olympic sign the Agreement before DCT would allow Olympic to have access to any confidential information about Utilase.

12. In signing the Agreement, Olympic agreed, among other things, not to solicit any Utilase employee through January 11, 1998.

13. After Olympic had signed the Agreement, Olympic representatives conducted "due diligence" in connection with its interest in purchasing Utilase. This included discussions with Utilase

representatives, review of Utilase documents, and a tour of the Utilase facilities.

14. Olympic acquired Utilase's confidential information as a result of this due diligence.

15. During the tour, Utilase introduced Olympic representatives to Mark Williamson. At the time, Mr. Williamson was Utilase's Engineering Manager.

16. On January 30, 1990 and March 15, 1990, Mr. Williamson signed nearly identical Confidentiality Agreements with Utilase (collectively "the Confidentiality Agreements"). The execution of the Confidentiality Agreements was a condition of employment by Mr. Williamson at Utilase.

17. Olympic did not purchase Utilase. Instead, it entered into negotiations with U.S. Steel, Inc. about forming a joint venture for the purpose of doing laser blank welding.

18. This prospective joint venture was to be in direct competition with Utilase.

19. On or about October 3, 1996 (at the latest) Olympic began contacting Mr. Williamson about working for Olympic as follows:

a. Olympic called Mr. Williamson at his home on or about October 4, 1996 to discuss employment opportunities at Olympic;

b. Olympic spoke with Mr. Williamson by telephone about employment opportunities on or about October 11, 1996;

c. Olympic met with Mr. Williamson at Mortons, a restaurant in Southfield, Michigan to discuss employment opportunities on or about October 15, 1996;

d. Olympic arranged for Mr. Williamson to visit its Cleveland, Ohio headquarters for a tour during the week following the October 15, 1996 meeting; at that time, Olympic's Chief Executive Officer and Chairman took Mr. Williamson to dinner; and Olympic offered Mr. Williamson the position of General Manager of its prospective joint venture with U.S. Steel on or about October 22, 1996.

20. Olympic's employment offer provided compensation that was substantially greater than what Mr. Williamson had been earning at Utilase at the time.

21. Olympic asked Mr. Williamson to attend a meeting of the laser blank welding joint venture on October 31, 1996. At the time, Mr. Williamson was still a Utilase employee.

22. Mr. Williamson submitted his resignation notice on October 29, 1996. He noted in his resignation letter that he had been given an employment offer that he could not refuse.

23. Mr. Williamson attended a laser blank welding joint venture meeting on October 31, 1996 in Cleveland, Ohio.

24. Olympic knew, as of October 31, 1996, that Mr. Williamson had signed a Confidentiality Agreement with Utilase. Olympic knew this before Mr. Williamson had decided to accept its employment offer. Nevertheless, Olympic did not retract its employment offer or take any significant action in response to this information.

25. Mr. Williamson accepted Olympic's offer of employment on November 8, 1996 and began to work for Olympic on November 11, 1996.

26. On November 5, 1996, Utilase's counsel sent a letter to Olympic advising it of its breach of the Agreement.

27. Olympic did not retract its offer of employment to Mr. Williamson based on this letter.

28. From November 11, 1996 through January 17, 1997, Mr. Williamson performed a variety of services related to laser blank welding on behalf of Olympic, including, at a minimum, the following:

a. Making modifications to the laser blank welding system ordered by the joint venture.

b. Preparing a quotation for laser blank welding parts to General Motors.

c. Searching for the optimal site for the joint venture's laser blank welding facility.

d. Preparing the plant layout for the laser blank welding facility.

29. These services directly and necessarily resulted in the use and disclosure of Utilase's trade secrets.

COUNT I BREACH OF CONTRACT

30. Plaintiffs reallege Paragraphs 1 through 29 as though each were fully set forth herein.

31. DCT and Olympic signed the Agreement on January 11, 1-996 . [Exhibit A].

32. The Agreement was supported by valid consideration.

33. From October 4, 1996 (at the latest) through November 8, 1996, Olympic repeatedly breached the Agreement by soliciting Mr. Williamson in connection with employment opportunities at Olympic.

WHEREFORE, Plaintiffs request that this Court enter judgment against Defendant in excess of $75,000.00, plus interest, costs, and attorney fees, and any other relief the Court deems appropriate.

COUNT II MISAPPROPRIATION OF TRADE SECRETS

34. Plaintiffs reallege Paragraphs 1 through 33 as though each were fully set forth herein.

35. Utilase employed Mr. Williamson for nearly seven years.

36. During that time, Utilase divulged to Mr. Williamson numerous trade secrets involved in its complex welding processes.

37. These trade secrets included concepts and ideas related to laser technology for blank welding and the designing and manufacturing of engineering systems for the blanks edge preparation and subsequent welding as well as information relating to research, engineering, marketing, client or customer lists, and merchandising and selling.

38. These trade secrets are not generally known to Utilase's competitors or others outside of Utilase's own business.

39. These trade secrets are known only by Utilase's employees who have a need to know them.

40. Utilase takes the following measures, among others, to guard the secrecy of these trade secrets: (1) permits only designated employees access to these trade secrets; (2) requires that outside individuals or entities sign a non-disclosure agreement before being allowed access to these trade secrets; (3) limits access to areas of Utilase in which these trade secrets could be discovered; (4) requires that employees of Utilase sign a Confidentiality Agreement covering the use and disclosure of these trade secrets; and (5) conducts exit interviews with employees at which time these employees are reminded of their obligations under their Confidentiality Agreement.

41. These trade secrets are of great value to Utilase because they form the technological core of Utilase's business. Utilase has spent a substantial amount of time and effort over the course of many years in addition to millions of dollars on these secrets.

42. Utilase's competitors would find these trade secrets of great value because they would allow these competitors to compete with Utilase without having to spend the substantial time, money and resources that Utilase has been required to expend to develop these trade secrets.

43. At the time that Olympic hired Mr. Williamson, it knew that Mr. Williamson possessed Utilase trade secrets.

44. Olympic hired Mr. Williamson for the purpose of gaining access to trade secrets that Mr. Williamson acquired at Utilase.

45. Olympic has misappropriated Utilase trade secrets by hiring Mr. Williamson for the purpose of gaining access to Utilase trade secrets and by knowingly using Utilase trade secrets to compete with Utilase.

46. Olympic's misappropriation of trade secrets has injured Utilase by, among other things, depriving it of profits that Utilase would have made but for the misappropriation, depriving it of the value of the substantial amount of time and money spent to develop the trade secrets, and reducing the value of Utilase's business.

WHEREFORE, Plaintiffs request that this Court enter judgment against Defendants in excess of $75,000.00, plus interest, costs, and attorney fees as well as the injunctive relief requested in Count V.

COUNT III TORTIOUS INTERFERENCE WITH CONTRACT

47. Plaintiffs reallege Paragraphs 1 through 46 as though each were fully set forth herein.

48. Mr. Williamson signed a Confidentiality Agreement with Utilase.

49. That Confidentiality Agreement has been in force and effect at all relevant times.

50. As of October 31, 1996 (at the latest), Olympic knew for certain that Mr. Williamson had signed a Confidentiality Agreement with Utilase.

51. Despite that knowledge, Olympic intentionally and improperly interfered with that Confidentiality Agreement by, among other things, soliciting Mr. Williamson to work for Olympic.

52. As a direct and proximate result of Defendant's wrongful conduct, Plaintiffs have suffered substantial economic injury, loss of goodwill, harm to its business reputation, loss of esteem and standing in the community, and loss of business opportunities.

WHEREFORE, Plaintiffs request that this Court enter judgment against Defendant in excess of $75,000.00, plus interest, costs, and attorney fees as well as the injunctive relief requested in Count V.

COUNT IV UNJUST ENRICHMENT

53. Plaintiffs reallege Paragraphs I through 52 as though each were fully set forth herein.

54. Plaintiffs developed and implemented a successful laser blank welding system, and associated commercially valuable information, through a substantial investment of money, time, and effort.

55. Plaintiffs gave Mr. Williamson an intimate understanding of this information as part of his duties and responsibilities for Utilase.

56. Mr. Williamson signed a Confidentiality Agreement as a condition of his employment with Utilase.

57. Olympic knew of the existence of this Confidentiality Agreement before it hired Mr. Williamson.

58. Olympic hired Mr. Williamson for the purpose of gaining access to Utilase's confidential information.

59. Olympic knowingly received confidential information from Mr. Williamson.

60. Olympic has directly benefitted and, unless stopped, will continue to benefit from the knowledge imparted to Olympic by Mr. Williamson.

61. Olympic has unjustly benefitted from Utilase's knowledge and effort by failing to pay Plaintiffs for the value of the information received from Mr. Williamson.

WHEREFORE, Plaintiffs request that this Court enter judgment against Defendant in excess of $75,000.00, plus interest, costs, and attorney fees as well as the injunctive relief requested in Count V.

COUNT V INJUNCTIVE RELIEF

62. Plaintiffs reallege Paragraphs 1 through 61 as though each were fully set forth herein.

63. Olympic's breach has caused, is causing, and will continue to cause irreparable harm to Plaintiffs.

64. This irreparable harm cannot be fully and adequately redressed by a remedy at law.

65. As a result of Olympic's breach, Plaintiffs are entitled to an injunction restraining Olympic, among other things, from using or disclosing Utilase's confidential information or from employing or using the services of Mr. Williamson in any capacity.

WHEREFORE, Plaintiffs request that this Court issue an injunction enjoining Olympic from disclosing or using Utilase's confidential information or from employing or using the services of Mr. Williamson in any capacity, and that Plaintiffs be awarded its costs and attorney fees incurred pursuing this action.

YOUNG AND ASSOCIATES, P.C.
BY: RODGER D. YOUNG (P22652)
STEVEN SUSSER (P52940)
Attorneys for Plaintiffs
26200 American Drive, Suite 305
Southfield, Michigan 48034
(810) 353-8620

DCT, Inc.
20101 Hoover Road
Detroit, Michigan 48205-1031
313-839-9800
313-839-1112 Fax

January 11, 1996

Mr. Michael Siegel
Chief Executive Officer
Olympic Steel, Inc.
5080 Richmond Road
Cleveland, OH 44146

Dear Mr. Siegel:

You have expressed interest in exploring a possible transaction involving Utilase, Inc. (including its subsidiaries, divisions and affiliates, the "Company") and you (a "Transaction"). At the present time, the Company is a subsidiary of DCT Inc. ("DCT"). We understand that prior to or during the course of negotiations, certain confidential information concerning the Company may be disclosed to you or your advisors, either in written form or orally (including any Offering Memorandum and reports and valuations prepared in connection therewith, the "Evaluation Material"). It is explicitly agreed that this Agreement creates no obligation to enter into a transaction or any agreement relating to a Transaction. In consideration of the Evaluation Material being made available to you or your advisors, you agree as follows:

1. No disclosure of your interest in a Transaction with the Company will be made by you or on your behalf prior to the execution of a legally binding agreement with respect to a

Transaction and subsequent to that up to and including the date of completion of a Transaction, except as required by applicable law and subject to the provisions of paragraph 5 hereof.

2. The Evaluation Material will be held in complete confidence and, without the Company's prior written consent, will not be disclosed, in whole or in part, to any other person (other than such of your directors, officers, employees and advisors as are concerned with your interest in a Transaction), nor will it be used in any way directly or indirectly detrimental to the Company or for any purpose other than your internal evaluation of the Company (which will itself be kept confidential and not so used) or negotiations concerning a Transaction. The term "Evaluation Material" does not include any information:

(a) which at the time of disclosure to you or your advisors is in the public domain or which after such disclosure comes into the public domain through no fault of yourselves or your advisors; or

(b) which was available to you on a non-confidential basis from a source other than the Company or its advisors, provided that such source is not and was not bound by a confidentiality agreement with the Company; or

(c) the disclosure of which is required by applicable law, subject to the provisions of paragraph 5 hereof.

3. You shall be responsible for ensuring that your directors, officers, employees and advisors and each other individual to whom such disclosure is made by you or on your behalf, adhere to the terms of this undertaking as if he or she were a party hereto.

4. Upon the request of the Company, or if you cease to be interested in pursuing a Transaction, you and your advisors will return to the Company any Evaluation Material provided to you or your advisors, and all copies thereof which may have been made by or on behalf of you or your advisors, and shall either hand over to the Company or destroy all notes or memoranda or other stored information of any kind prepared by you relating to the Evaluation Material or the negotiations generally.

5. If you or your advisors become (or it is reasonably likely that you or they shall become) legally compelled to disclose any Evaluation Material, prompt notice of such fact shall be given to the Company so that any appropriate action may be taken, which action may include the procurement of an appropriate protective order.

6. Without prejudice to any other rights or remedies the Company may have, you acknowledge and agree that damages would not be an adequate remedy for any breach of this letter and the Company shall also be entitled to the remedies of injunction, specific performance and other equitable relief for any threatened or actual breach of this Agreement.

7. You acknowledge that, except as may be set forth in a legally binding agreement with respect to a Transaction, neither the Company nor any of its directors, employees or advisors, including its directors, officers, agents or employees, accept responsibility for or make any oral or written representation, express or implied, with respect to the accuracy or completeness of the Evaluation Material supplied under this letter or otherwise in connection with a possible Transaction or any oral communication in connection therewith.

8. During the period of two years commencing on the date hereof, you shall not solicit or actively seek to solicit the services, as employee, consultant or otherwise, of any person who during such period is employed by DCT or the Company, whether or not such person would commit any breach of his contract of service in leaving such employment.

9. If any time during the term of this Agreement you are approached by any person concerning your participation with such person in a transaction involving any of the assets, businesses or securities of the Company, you will promptly notify the Company of the nature of such contact and the parties thereto.

10. You acknowledge and confirm that any information made available to you or your advisors prior to, in the course of, or for the purpose of negotiations, will not constitute an offer by the Company or on the Company's behalf, nor will any such information form the basis of any contract, concerning a Transaction, which offer will be constituted solely by a definitive agreement to be executed.

11. You acknowledge that the Company and the Company's advisors shall be free to conduct a process of exploring a possible Transaction as they in their sole discretion shall determine, including, without limitation, negotiating with any of the prospective strategic partners and entering into a definitive agreement.

12. With regard to a Transaction, you will maintain contact with DCT and the Company at all times only through the Company's financial advisor, Palisade Capital Securities, L.L.C. ("Palisade Capital") and will not attempt any direct communication with the Company without the express permission of Palisade Capital.

13. No failure or delay by the Company in exercising any right, power or privilege under this letter shall operate as a waiver thereof and no variation shall be effective, unless in writing and signed by an officer of the Company on its behalf.

14. The illegality, invalidity or unenforceability of any provision hereof under the laws of any jurisdiction shall not affect its legality, validity or enforceability under the laws of any other jurisdiction, or the legality, validity or enforceability of any other provision.

15. This Agreement shall terminate two years from the date hereof.

This Agreement shall be governed by and construed in accordance with the laws of the State of Michigan without regard to the conflicts of law principles thereof.

Very truly yours,
DCT, Inc.
By: David C. Stone
Vice Chairman and General Counsel
Accepted and Agreed to
By Michael Siegal
Name: Michael Siegal
Title: CEO

MC GINNIS & ASSOCIATES, INC.
COLUMBUS OHIO (614) 431-1344
IN THE UNITED STATES DISTRICT COURT
EASTERN DIVISION OF MICHIGAN
SOUTHERN DIVISION
DCI, Inc., a Michigan Corp., and Utilase, Inc., a Michigan Corp.,
Plaintiffs,
VS.
Olympic Steel, Inc., an Ohio Corp.,
Defendant.
Case No. 97CV60209AA
Judge Barbara Hackett

Deposition of Pete A. Klisares. a Witness herein, called by the Plaintiffs for Examination under the statute, taken before me, Misty Lynn Hastings-Kanoski, Professional Reporter and Notary Public in and for the State of Ohio, pursuant to notice and subpoena of counsel, at the offices of Karrington Health, Inc., 919 Old Henderson Road, Columbus, Ohio, on Friday, January 9, 1998, beginning at 10:23 o'clock a.m. and concluding on the same day.

* * *

A. But we would have to grow in simpler. They would have to grow in more complex. And, therefore, there was a fit, which had a value of more than different -- than just EBITDA.

Q. Right. Ultimately, this purchase price -- there were changes to this purchase price; is that a fair statement?

A. Several.

Q. Okay. Describe them for me, if you would, and why the changes occurred.

A. That's not at all abnormal, which when you do a letter of intent, that does not mean that's what you're going to pay. It means that

based on what you have told me and looking at the value we might place on something, as you describe it, that we would be willing to pay.

And then once you do your due diligence, you might change it, which we did several times; because their sales projections changed, their profitability projections changed. What we thought we could learn technically was disappointing. All of the other reasons you might --

Q. Tell me, after the initial purchase price of $20 million that's contained in Exhibit 1, what was the next purchase price that you can recall that was struck between the two parties? Was it higher or lower?

A. Lower.

Q. What was it, if you know?

A. As I remember, it was $18.5 million.

* * *

Q. Do you remember when you went to - Was the 20 in Exhibit just looking at?

A. Yeah.

Q. Okay. And then after that, you were about to say?

A. I think we then went to something more like 17.

Q. Do you remember when that was?

A. No, sometime in the month or so following this.

Q. Do you remember why you went to 17?

A. Just the changing and viewing of what was the makeup. We didn't have very good data at the beginning.

Q. Okay. And what did you -- After 17, did the 17 also have some individual employment contracts at $1 million each in addition to the $17 million purchase price?

A. We were talking about having a partial payout, yes. That would pay out over time to Baysore.

Q. Okay. And what happened?

A. And Henderson, I guess, as I remember.

Q. And after the $17 million with those partial payouts you referred to, what was the next purchase price that you can remember discussing with them?

A. I don't know that we ever got to another price until we got to the end.

Q. And what was the price at the end?

A. I'm not even sure that we put a final price on it. I think we said something like, you know, we don't see the value.

* * *

A. Well, there's negotiating and then there's how good are these numbers, how confident are you in these numbers, and we weren't trying to place his whole compensation on it.

He had a very high expectation because of his strong belief in the success of the company. And we said, "Well, that's fine, then we'll pay you this competitive wage but all of this additional you're looking for, we'll base it on what you feel you can accomplish".

Q. But you will agree that his position was merely in his own self-interest in terms of not being willing to peg his compensation to the projections; correct?

A. Yes. From one point to the other point, though, his representing himself as the key individual to drive and deliver.

Q. Yes.

A. His belief that they were attainable numbers. On the other hand, from a company point of view you have the opposite objective, and that is to have somebody accomplish what they say. In fact, the whole due diligence is about can you do what you say you're going to do. If you can't, we're not going to pay that for the company.

Q. Mr. Baysore never said they couldn't meet the projections, did he?

A. He said he thought they were very unrealistic.

Q. He used the word "unrealistic"?

* * *

Q. I was asking you if you had seen Exhibit 6 before.

A. Yes.

Q. What is Exhibit 6, if you know?

A. Just their income statement projected from '95 -- or, '97 to '99.

Q. Okay. Do you know if they met or exceeded these numbers?

A. No.

Q. You do not know?

A. No.

Q. Okay. Did you tell them at your last meeting with them, sometime in December of '96, that you questioned these numbers?

A. Well, these weren't even the numbers because they changed at least five times between this series and the final series, which we had, which took operating income from thirty-some percent in '99 to twenty-some percent, which was the major reason that we could not agree on the value and did not purchase the company.

Q. Now, so you're saying the major reason that you did not purchase the company was the 1999 net sales -- or, excuse me --

A. Net operating income was the bottom line there.

Q. Yes.

A. '97, '98 and '99 all became numbers in the lower 20s instead of the 30s.

Q. Okay. So we're talking here on this exhibit, Page 2 on the net sales line; is that correct?

A. Oh. absolutely we did.

Q. Okay. Do you have those documents?

A. No.

Q. All right. Did they tell you that the percent operating income was going to drop from the low 30s to the low 20s?

A. Baysore confirmed that.

Q. When?

A. In the final days of negotiations the numbers that were in the low 20s were the numbers that Baysore provided us with, which pressed them to validate these numbers by job part, by volume, by cost. He kept -- We revised these numbers probably seven or eight times.

Q. Okay. But I'm interested in the change from the low 30s to the low 20s. You're saying that occurred sometime in late November; early December?

A. No. We had a July set of numbers. We had a September set of numbers. We had an October set of numbers. We had two or three different November sets of numbers. Each time they were moving and...

Q. Moving around but not necessarily going -- Some were going up; some were going down?

A. Operating income was going down every time.

Q. Every time from July to --

A. December.

Q. In July to December, every time they gave you a new percent operating income number, it went down?

A. So when I --

Q. Is that correct?

A. Yes.

Q. Okay.

A. And when I -- As I recall it, when I went to the last meeting with them and I gave them a piece of paper, which maybe they -- maybe you have as an exhibit, I don't know, but it said here is sales, and here is income, and here's the percentage change in sales, and here's the percentage change in income, and here's the primary reason that we will not pay what we were talking about is you guys keep changing the numbers and you have no credibility. As far as I'm

concerned, Baysore won't stand behind them and he says they're not his numbers, and he won't agree to them. He doesn't feel strongly enough about them to commit himself to them, part of his salary being committed to it. And yet he wants -- as an owner, he wants the other side of it. He thinks he should have the higher numbers for his value, but he won't take them on the other side. And so far as I'm concerned, the company is not worth what we started out to pay because --

Q. Okay.

A. -- the numbers don't validate it.

Q. Okay. Now, you have your calculations showing how you actually made an offer of $14 million at the last meeting; isn't that true?

A. Well, what we said was we would be -- They said, well, what does this lead you to, and we said if you used the same kind of formula basis that we did in our earlier meeting and felt everything else was okay, we would be in the $14 million range, and Henderson said, "That's totally unacceptable. We don't -- we're not interested", and we said fine.

Q. And how did you get -- did you do a calculation that took you -- or, a methodology as to how you explained you got from $20 million to $14 million?

A. Well, I think we were doing the same third relationship in earnings.

Q. To the best of my -- So your recollection is that you took the percentage of decline on the last line of Exhibit 6; namely percent operating income, and applied that to the $20 million purchase price?

A. No. I'm sure that's simplistic, but, again, the CFOs did the calculation trying to look at it at that time the same way they looked at it in the first place.

Q. Yes.

A. But, in fact, it was off a third, and that's off a third, I guess you could reckon that the formula was probably consistent.

Q. Okay. So you don't remember how the CFOs did it, you just have a rough recollection that it was tied to percent of operating income decline?

A. Well, we were -- we were not even really making a $14 million offer; because Henderson already had said, "If you're coming here with less than" -- "coming here with a change from where you were before, we are not going to be interested because we think it's worth considerably more than the $20 that you are paying".

And so if you're going lower than that, we're not interested. And if we were to pursue it, we would be in the range of $14 million because of these reasons...

Q. Okay. And he said no way?

A. That's right. We didn't even get to a real quote offer.

Q. Okay. All right. I don't think I have any other questions. Oh, wait a minute; Exhibit 7. Let me make sure I understand everything on Exhibit 7.

MR. TEGER: While you're looking at Exhibit 7, there at the very top is the date of January 9, 1997. Is that supposed to be '97?

THE WITNESS: Yeah. I just now did it because...

MR. TEGAR: Or should it be '98?

THE WITNESS: Yes, that should be '98. I didn't even look at that.

MR. TEGER: I just wanted to clarify.

THE WITNESS: Yeah, that's '98.

* * *

A. We indicated that our value would be in the $14 million range. It was not really an offer because we knew it was not acceptable.

Q. Do you know what amount Utilase was looking for? I mean, how far apart were you realistically?

A. Well, they -- at least 20 because their computation was that we would come there and confirm the 20 in some method.

Q. So by your estimation, you were about $6 million apart.

A. Yes.

Q. Now, you came to the number of about $14 million based on computations of profitability; is that right?

A. Yeah.

Q. And if you had expected more profitability, you would have been willing to offer more money; correct?

A. Well, we had already kind of confirmed that, yes, if we if we -- were able to do due diligence to confirm what we had based other earlier estimates on, then we would fulfill them. We're a credible company. We've made multiple acquisitions. We've done this many, many times, and it's not very often that we get into it and stop.

Q. Now, you listed several other things that concerned TWB in connection with the acquisition or potential acquisition of Utilase, and I'm looking at your Exhibit No. 7. 1 presume that all of those reasons went into that $14 million number?

A. Yes.

Q. Now, one of the reasons was Williamson no longer being with Utilase; is that right?

A. Yes.

Q. Now, if he had been with Utilase, would you have been willing to pay more money?

A. No.

Q. You used the word "credibility" several times in referring to new information by Utilase. Is that another way of saying you simply didn't trust their management personnel?

A. Partly. I didn't trust the data.

Q. What about the personnel?

A. And the people giving the information. I guess it goes hand and hand to some degree.

Q. You were asked a question earlier on about proprietary information. I'm sorry, trade secrets. You felt that Utilase didn't really have any trade secrets; is that right?

A. Yeah. I would say that, you know, the way they had --

MR. YOUNG: Objection; competency.

BY MR. TEGER:

Q. You can answer.

A. -- the way they had their curtains over their manufacturing process and a great mystic about their capability, which as we got into it we were fairly disappointed with the state of their manufacturing, and from TWB's point of...

AFFIDAVIT OF WALTER J. OEHLER

Walter J. Oehler, being first duly sworn, states:

1. I am the Chief Financial Officer of Thyssen Inc., a Delaware, corporation ("Thyssen").

2. In 1995, Thyssen and Worthington Industries, Inc., were the principal partners of a partnership known as TWB ("TWB"), which has since converted into a limited liability company. TWB is engaged in the business of laser welding.

3. In 1995, TWB began negotiations and due diligence with respect to the purchase of the assets or stock of a company known as Utilase, Inc. ("Utilase").

4. I was a participant in TWB's efforts to analyze the purchase of Utilase.

5. TWB was interested in acquiring Utilase for the purpose of improving TWB's position in the laser welding industry.

6. On or about August 1, 1996, I joined with Mr. Kenneth J. Graham, President and Chief Executive Officer of Thyssen, in the preparation of a memorandum in which we valued Utilase for purchase purposes between $18,000,000 and $28,000,000, depending on Utilase's 1997 projections. A copy of this memorandum is attached as Exhibit A

7. On or about August 16, 1996, TWB and Utilase entered into a letter of intent to Purchase Utilase at a purchase price of $20,000,000.

8. In October of 1996, TWB presented a revised offer to Utilase to acquire Utilase for a purchase price of $17,000,000, plus significant consulting agreements for key personnel.

9. On or about December 1996, TWB decided to discontinue negotiations with Utilase.

10. In the negotiations with Utilase, TWB viewed Mr. Mark Williamson as a key employee of Utilase, and believed he would be a good addition to the combined business efforts of Utilase and TWB. When TWB learned that Mr. Williamson had left the employ of Utilase, TWB viewed this as a negative in the business operations of Utilase. In informal discussions within TWB, it was felt that of all of the employees of Utilase, Mr. Williamson was possibly the most important in connection with the continuing operations and in the understanding of the technology of Utilase.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DCT, INC., a Michigan corporation, and UTILASE, INC., a Michigan corporation,

Plaintiffs,

v.

OLYMPIC STEEL, INC., an Ohio corporation,

Defendant.

Case No. 97 CV 60209 AA
Hon. Barbara Hackett
Magistrate Steven Pope

RODGER D. YOUNG (P22652)
STEVEN SUSSER (P52940)
Young & Associates, P.C.
Attorneys for Plaintiffs
26200 American Drive, Suite 305
Southfield, Michigan 48034
(248) 353-8620
SHARON WOODS (P22542)
Barris, Sott, Denn & Driker
Attorneys for Defendant
211 W. Fort Street. 15th Floor
Detroit, MI 49226-3287
(313) 965-9725

AFFIDAVIT OF ROBERT J. SKANDALARIS

I, Robert J. Skandalaris, being duly sworn, depose and state as follows:

1. I have personal knowledge of the facts stated in this affidavit, I am competent to testify to those facts, and I would testify to them if called upon to do so.

2. I am Chief Executive Officer of Noble International, Ltd.

3. On November 24, 1997, Noble International, Ltd. purchased all the shares and assets of Utilase, Inc.

4. At the time of this purchase, Noble knew that Mark Williamson, Utilase's former Chief Engineer, had left Utilase to work for a competitor, Olympic Laser Processing, Inc. (a company that I understand to have been formed through a joint venture between Olympic Steel, Inc. and U.S. Steel, Inc.).

5. Noble believed that the major portion of Utilase's value lay in its confidential information.

6. The fact that Mr. Williamson had left to join a competitor meant that Utilase's confidential information would be available in the marketplace.

7. As a result, Utilase would no longer have exclusive control over this confidential information. In fact, Olympic Steel, Inc. and U.S. Steel, Inc. are capable of committing enormous resources to a laser blank welding joint venture. This made Mr. Williamson's departure especially threatening to Utilase from Noble's point of view.

8. Noble would have been willing to pay more than it did for Utilase if Noble had had some assurance that Utilase's confidential

information would not have been made available to a Utilase competitor.

Robert J. Skandalaris

Subscribed and sworn to before me on this 16th day of November, 1998

Notary Public
Oakland County
My Commission Expires: 1/27/03
CHRISTINE F. KRUSINSKI
Notary Pubic, Oakland County, MI
My Commission Expires 01/27/2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DCT, INC., and UTILASE, INC.,
Plaintiffs,
vs.
OLYMPIC STEEL, INC.,
Defendant.
Case No. 97-CV-60209-AA
HON. BARBARA K. HACKETT

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (LIABILITY ONLY) AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON COUNT I (BREACH OF CONTRACT)

In the above-captioned case, plaintiffs allege that defendant breached a nonsolicitation agreement by pursuing and then hiring Utilase, Inc.'s chief engineer Mark Williamson. Now before the court is plaintiffs' motion for partial summary judgment as to liability on their breach of contract claim (Count 1), and defendant's motion for summary judgment on Count 1. For the following reasons, plaintiffs' motion shall be denied, and defendant's will be granted.

1. FACTS

Plaintiff Utilase, Inc. (Utilase) and defendant Olympic Steel, Inc. (Olympic) are business adversaries in the highly competitive field of laser blank welding. However, in late 1995 and 1996, when Olympic

was contemplating entry into the laser blank welding market, Utilase's former owner DCT, Inc. (DCT) agreed to discuss with Olympic the possibility of selling Utilase if Olympic would first agree to certain disclosure safeguards. Thus, on January 11, 1996, Olympic's CEO Michael Siegal signed an agreement promising to maintain the confidentiality of Utilase's proprietary information and to refrain from soliciting any Utilase employee for two years. DCT's vice president and general counsel also signed the agreement, which provides the basis for plaintiffs' breach of contract claim. Specifically at issue is the following clause:

8. During the period of two years commencing on the date hereof, [Olympic] shall not solicit or actively seek to solicit the services, as employee, consultant or otherwise, of any person who during such period is employed by DCT or [Utilase], whether or not such person would commit any breach of his contract of service in leaving such employment.

After the contract was signed, DCT provided Olympic with a memorandum that described Utilase in detail and contained confidential operational and financial information, such as DCT's debt situation.[1] Also included was a list of Utilase's key employees including Mark Williamson. Subsequently, Olympic representatives met Williamson when they toured Utilase.

The discussions between DCT and Olympic ultimately did not result in any deal. In fact, Olympic eventually entered into a rival

---

[1] In 1993 and 1994, DCT borrowed $36 million from the Detroit General Retirement System. By 1996, DCT still owed $34 million and was in default on the loan. DCT was therefore attempting to restructure and reduce its debt.

laser blank welding joint venture with U.S. Steel. Consequently, DCT began negotiations regarding a possible purchase of Utilase by TWB, a company that was and is in the laser welding business.[2]

On or about August 1, 1996, for purchase purposes, TWB valued Utilase between $18-28 million, depending upon Utilase's 1997 projections. On August 16, 1996, TWB signed a letter of intent to purchase Utilase at a price of $20 million. Subsequently, in October of 1996, TWB submitted a revised offer to DCT to acquire Utilase for $17 million. Finally, in December of 1996, TWB decided to discontinue its negotiations with DCT regarding the purchase of Utilase.

Plaintiffs argue that from as early as August, 1996, Olympic had identified Mark Williamson as its favorite candidate for the position of laser blank welding manager and continued to pursue him with zeal until Williamson accepted Olympic's employment offer in October of 1996, thereby breaching the non-solicitation agreement. Plaintiffs insist that Williamson's departure negatively impacted their negotiations with TWB because TWB viewed Williamson as "possibly the most important in connection with the continuing operations and in the understanding of the technology of Utilase."

In order to reduce its debt to the Detroit General Retirement System (DGRS), DCT ultimately sold Utilase to Noble, Inc. on

---

[2] TWB is the joint venture of Thyssen Steel, Inc. and Worthington Industries, Inc.

November 24, 1997, but for far less than it had anticipated.[3] DCT explains that prior to Williamson's departure, it had reached a restructure agreement with DGRS whereby the first $10 million in proceeds from the sale of Utilase would be used as DCT's working capital. Of the remainder received, DGRS would be paid the next $5.8 million and 50 percent of all proceeds received above $15.8 million. All monies received by DGRS from Utilase would first pay down the preferred stock owned by DGRS. However, because the purchase by Noble realized a lesser amount than expected, and the initial cash payment took place almost one year later than plaintiffs had anticipated, plaintiffs contend:

> DCT was not able to pay down the preferred stock of DGRS and the line of credit to the same extent nor during the same time period as would have occurred had DCT been able to sell Utilase for its fair market value [alleged to be $28 million) prior to the departure of Mr. Williamson.

Accordingly, plaintiffs filed suit against Olympic. Count I of their complaint alleges that Olympic "repeatedly breached the [non-solicitation agreement] by soliciting Mr. Williamson in connection with employment opportunities at Olympic." Plaintiffs opine "that the economic loss as a result of Mr. Williamson's hiring by Olympic, including the loss of trade secrets and proprietary information, approximates $25.8 million." In reaching that figure, plaintiffs maintain that when Williamson left the company, Utilase was worth between $28-30 million, and that afterwards, when Williamson

---

[3] Plaintiffs' expert calculated the present value of the Noble purchase price to be approximately $13.1 million.

began working for Olympic, Utilase was sold to Noble for substantially less consideration. Thus, plaintiffs conclude:

> The damages to DCT as a result of the hiring of Mr. Williamson by Olympic include the present value of the difference in price between the fair market value of Utilase as of the time Mr. Williamson discontinued his employment with Utilase and the amount actually paid by Noble. In addition, at approximately the same time Mr. Williamson left the Company, DCT was negotiating a restructuring with the General Retirement System of the City of Detroit ("GRS"), which had loaned the Company $34 million. As a result of the loss in fair market value of Utilase at the time Mr. Williamson resigned, DCT has additionally incurred substantially more in dividend costs and interest expense on its restructured preferred stock with the GRS and higher line of credit balances with its bank.

Now before the court are the parties' cross motions for summary judgment as to Count 1. In their motion, plaintiffs argue that the record clearly demonstrates Olympic's solicitation of Williamson and thus its breach of contract. On the other hand, defendant contends that it did not solicit Williamson in violation of its agreement with plaintiffs because it was Williamson who initiated the contact with Olympic. In support of its position, defendant explains that only two witnesses-David Lenzi and Williamson-have direct knowledge of the contacts between Olympic and Williamson, and both have testified that Williamson first approached Lenzi about a position at Olympic. Defendant thus concludes that the facts do not establish solicitation by Olympic because Olympic took no affirmative action to contact Williamson. For this reason, defendant

argues that plaintiffs' motion should be denied, and summary judgment should be granted in defendant's favor as to plaintiffs' breach of contract claim.

Alternatively, defendant argues in its motion for summary judgment that plaintiffs have no actionable claim for breach of contract because they cannot establish a causal link between their losses and Olympic's alleged breach. Furthermore, defendant contends that plaintiffs' claimed damages do not arise naturally from Olympic's employment of Williamson, nor were they reasonably in the contemplation of both parties as a probable result of a breach at the time the contract was made.

On April 15, 1999, the court heard arguments on the parties' pending motions. After careful consideration, the court determines that plaintiffs' motion for partial summary judgment on the liability issue must be denied because facts remain in dispute as to who initiated the contact between Williamson and Olympic, and when. Credibility of the witnesses is for the fact finder to assess, not the court. Regarding defendant's motion for summary judgment on Count I (breach of contract), the parties stated on the record that they would rely on their briefs, to which the court now turns:

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) empowers the court to render summary judgment "forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See F.D.I.C. v. Alexander, 78 F.3d 1103, 1106 (6th

Cir. 1996). The Supreme Court has affirmed the courts' use of summary judgment as an integral part of the fair and efficient administration of justice. The procedure is not a disfavored procedural shortcut. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); see also Kutrom Corp. v. City of Center Line, 979 F.2d 1171, 1174 (6th Cir. 1992).

The standard for determining whether summary judgment is appropriate is "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Winningham v. North Am. Resources Corp., 42 F.3d 981, 984 (6th Cir. 1994) (citing Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1310 (6th Cir. 1989)). The evidence and all inferences therefrom must be construed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Enertech Elec., Inc. v. Mahoning County Comm'r., 85 F.3d 257, 259 (6th Cir. 1996); Wilson v. Stroh Co., Inc., 952 F.2d 942, 945 (6th Cir. 1992). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); see also Hartleip v. McNeilab, Inc., 83 F.3d 767, 774 (6th Cir. 1996).

If the movant establishes by use of the material specified in Rule 56(c) that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law, the opposing party must come forward with "specific facts showing that there is a genuine issue for trial." First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 270 (1968); see also Adams v. Philip Morris, Inc., 67 F.3d 580, 583

(6th Cir. 1995). Mere allegations or denials in the non-movant's pleadings will not meet this burden. Anderson, 477 U.S. at 248. Further, the non-moving party cannot rest on its pleadings to avoid summary judgment. It must support its claim with some probative evidence. Kraft v. United States, 991 F.2d 292, 296 (6th Cir.), cert. denied, 510 U.S. 976 (1993).

III. DISCUSSION

Damage is a necessary element of an action for breach of contract under Michigan law. See, ex.1 , Davis v. Kramer Bros. Freight Lines, Inc., 361 Mich. 371, 376, 105 N.W.2d 29, 32 (1960). Therefore, plaintiffs' prima facie case for Count I must not only establish a breach, but also damages resulting from that breach. See, e.g., Shippey v. Madison Dist. Pub. Sch., 55 Mich. App. 663, 668, 223 N.W.2d 116,119 (1974); see also Home Ins. Co. v. Commercial & Indus. Sec. Serv., Inc., 57 Mich. App. 143, 225 N.W.2d 716 (1974) (affirming judgment for defendant where plaintiff failed to establish that destruction of building was result of breach of contract due to absence of security guard).

Here, Olympic argues that even assuming a breach of the non-solicitation agreement, plaintiffs have failed to come forward with any proof that they suffered damages as a result of the breach. Moreover, Olympic states: "in fact, Utilase's decision to employ Mr. Williamson on an at-will basis flies in the face of any suggestion that his value to the company exceeded $25 million." The court agrees.

Plaintiffs maintain that Williamson's "defection reduced Utilase's value ... by [dooming] the purchase of Utilase by TWB." However, the record belies that assertion. Peter Klisares, former

Executive Vice President of Worthington Industries, Inc., was one of the individuals who led the negotiations with DCT for the purchase of Utilase. He testified that although TWB initially offered $20 million in August of 1996, to acquire Utilase, by December of 1996, TWB was unwilling to pay more than $14 million, leaving the parties about $6 million apart. According to Klisares, the "bottom line" for the drop in price was that Utilase's net sales forecasts continued to drop throughout the due diligence period, and Utilase would not stand behind its forecasts. In fact, Klisares unequivocally stated that TWB would not have paid any more for Utilase even if Williamson had remained working there. Furthermore, Bronce Henderson, III, Chairman of DCT, confirmed that plaintiffs told TWB they would not accept any amount less than the original price of $20 million. Thus, the uncontradicted testimony establishes that TWB was unwilling to offer a sufficient price for Utilase, with or without Williamson, and neither TWB's belief that Williamson was a "key employee" nor that his departure was "a negative" changes that fact.

Similarly, plaintiffs cannot prove their theory that the price Noble ultimately paid for Utilase was demonstrably less than it would have been had Olympic not breached its contract by soliciting Williamson. The only evidence proffered in support of plaintiffs' argument is the affidavit of Robert Skandalaris, Chief Executive Officer of Noble, stating: "Noble would have been willing to pay more than it did for Utilase if Noble had had some assurance that Utilase's confidential information would not have been made available to a Utilase competitor." However, nothing suggests that but for Williamson's departure, Utilase's alleged confidential information would have remained intact at the time of its sale. Moreover, Williamson had no employment contract with Utilase and

was free to leave at any time. Even this court's injunction prohibiting Williamson from disclosing confidential information for a period of one year expired before the Noble purchase was finalized. Accordingly, plaintiffs have failed to establish that Olympic's purported breach of the nonsolicitation agreement proximately caused them to suffer any damages.

In addition to plaintiffs' inability to demonstrate a causal link between Olympic's supposed breach and the alleged damages, plaintiffs' requested damages are not recoverable as a matter of law. "[T]he damages recoverable for breach of contract are those that arise naturally from the breach and were within the contemplation of the parties at the time the contract was executed." Parmet Homes, Inc. v. Republic Ins. Co., 111 Mich. App. 140, 149, 314 N.W.2d 453, 457 (1981) (citing Kewin v. Massachusetts Mut. Life Ins. Co., 409 Mich. 401, 414, 295 N.W.2d 50, 52-53 (1980)). "Accordingly, in a commercial contract situation such as is involved here, application of this principle generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed under it." Held Constr. Co., Inc. v. Michigan Nat'l Bank of Detroit, 124 Mich. App. 472, 477, 335 N.W.2d 8,10 (1983) (citing Kewin, 409 Mich. at 414-15, 295 N.W.2d at 53) (affirming summary judgment in favor of defendant where plaintiff claimed that it had lost future profits when it was rendered insolvent by defendant's refusal to make payment as required by contract). Furthermore, "[u]nless the parties are both aware that a breach will affect a specific collateral enterprise, it cannot be said that the loss of profits from the other venture is within the contemplation of the parties." Parmet Homes, 111 Mich. App. at 150, 314 N.W.2d at 458.

In this case, the damages sought by plaintiffs do not flow naturally from Olympic's alleged breach of the non-solicitation agreement. Had Utilase replaced Mark Williamson, the costs of replacing him would have resulted directly from Olympic's breach of the contract. However, the defection of a single at-will employee does not ordinarily give rise to $25.8 million in damages consisting of a $15 million reduction in value to the corporate employer and a $10 million increase in borrowing costs. Clearly, plaintiffs' claimed losses are not a consequence arising naturally from the alleged breach.

In addition, plaintiffs' alleged damages were not within the contemplation of the parties at the time they executed their agreement. Plaintiffs argue that DCT was engaged in a general effort to sell Utilase, and that Olympic should have known a future sale would be more difficult without Williamson. However, as held in Parmet Homes, 111 Mich. App. at 150, 314 N.W.2d at 458, "[u]nless the parties are both aware that a breach will affect a specific collateral enterprise, it cannot be said that the loss of profits from the other venture is within the contemplation of the parties" (emphasis added). It is undisputed that when Olympic and DCT signed the non-solicitation agreement, neither knew about the prospective sale of Utilase to TWB or Noble.

> The purpose of damages for breach of contract is to put the plaintiff in the same position as he would have been in had the defendant kept his contract. The injured party is not entitled to be placed in a better position than he would have been had the contract not been broken.

Id. at 150-51, 314 N.W.2d at 458. Here, plaintiffs seek damages based on a sale price for Utilase they could only speculate they would be able to attain at the time the nonsolicitation agreement was executed. Nevertheless, plaintiffs contend that Olympic should have contemplated the eventual inability of DCT to achieve that price from then unknown potential purchasers. An award of damages under these circumstances is not supported by Michigan law and, in effect, would result in a windfall to plaintiffs.

IV. CONCLUSION

For the reasons stated above,

IT IS ORDERED that plaintiffs' motion for partial summary judgment (liability only) hereby is DENIED.

IT IS FURTHER ORDERED that defendant's motion for summary judgment on Count I (breach of contract) hereby is GRANTED.

Dated: May 5, 1999.

BARBARA K. HACKETT
United States District Judge

In The Matter Of:
Utilase, Inc., a Michigan Corporation v. Mark S. Williamson, an individual
Michael D. Siegal
March 6, 1997
Corsillo & Grandillo
Court Reporters
950 Citizens Building
850 Euclid Avenue
Cleveland, OH USA 44114
(216) 523-1700 FAX: (216) 523-1997

Q: Are not sure?

A: Yeah.

Q: Was the Bethlehem-Lafayettejoint venture producing both laser and mash welded parts?

A: No, it wasn't producing any parts.

Q: It wasn't?

A: No.

Q: Was it engaged in lasers or mash welding?

A: It was. It had mash welding technology in place that never succeeded in getting any business.

Q: And, hence, it was dissolved?

A. Hence, it was dissolved.

Q: Okay. So as of early 1996, Olympic Steel was still interested in pursuing a welding joint venture, is that a fair statement?

A. Yes, it is.

Q: Why didn't Olympic Steel decide to go out on its own in early 1996 without a joint venture partner?

A. With our experience in the joint venture with Bethlehem, it became apparent to us, Olympic Steel, that the customer base that would be predominantly automotive.

* * *

Q: What do you understand to be the purpose of the non-solicitation paragraph, paragraph 8 in Plaintiff's Exhibit 2?

A: What about the purpose of it?

MR. DIAMANT: Objection.

A: Just to prevent the entity from pursuing the employees that they might meet during their due diligence process.

Q: And why would that be a goal of a non-solicitation?

MR. DIAMANT: Objection.

A: Obviously -

MR. DIAMANT: Only if you know.

A: I'm not sure. It would be to protect people.

Q: Protect whom?

A: The specific employees of that company.

Q: So the purpose of this common solicitation agreement, as you understand it, is to protect employees who might be approached, or solicited rather?

A: Possibly.

Q: Any other purpose that you can see?

A: No, that's about it. I mean, interpretations are vast and wide.

Q: Isn't it possible that one purpose of a non-solicitation clause such as found in Plaintiff's Exhibit 2 is to prevent a reduction in the value of the company by removing from it potentially valuable employee?

MR. DIAMANT: Objection.

A: It's certainly possible.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
DCT, INC., and UTILASE, INC.,
Plaintiffs,
vs.
OLYMPIC STEEL, INC.,
Defendant.
Case No. 97-CV-60209-AA
HON. BARBARA K. HACKETT

ORDER GRANTING DEFENDANT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

In Count II of their complaint, plaintiffs Utilase, Inc. and its former owner DCT, Inc. contend that defendant Olympic Steel, Inc. misappropriated their trade secrets when it hired Utilase's former employee Mark Williamson and knowingly used those trade secrets to compete with Utilase. However, this court already decided the same claim in a previous lawsuit, Utilase, Inc. v. Mark S. Williamson, No. 97-CV-60001-AA, in which Utilase alleged that Williamson misappropriated its trade secrets through his employment with Olympic Steel. In addition, in the first case, Utilase sought to enjoin Williamson from working for Olympic Steel. This court granted Utilase an injunction for one year, but refused to extend it beyond one year. Utilase again seeks to extend the injunction beyond one year in Count V of the present case. Now before the court is defendant's motion for partial summary judgment, arguing that relitigation of each of these claims is barred by the doctrines of res judicata and collateral estoppel. For the following reasons, defendant's motion shall be granted.

Mark Williamson worked for Utilase until November 8, 1996, when he went to work for Utilase's competitor Olympic Steel on November 11, 1996. Utilase filed its first lawsuit against Williamson on December 10, 1996, alleging several claims, including misappropriation of trade secrets. Utilase sought an immediate injunction to enjoin Williamson from working on laser blank welding, based on a confidentiality agreement he had signed that prevented him from using or disclosing alleged proprietary information for one year after terminating his relationship with Utilase. The court granted an injunction enjoining Williamson from, inter alia, using or disclosing confidential information until November 8, 1997, one year from the time he left Utilase.

The court subsequently granted Williamson's motion for partial summary judgment, dismissing Utilase's misappropriation of trade secrets claim on the merits. The court held that Utilase had

> pointed to no evidence whatsoever from which a jury reasonably could conclude that defendant used or disclosed a specific protectable trade secret. Utilase's speculation and hope that it could dupe a jury into finding a misappropriation despite a lack of probative evidence fails to meet its burden of refuting defendant's motion with the requisite "specific facts showing that there is a genuine issue for trial."... Therefore, Count II of Utilase's complaint must be dismissed.... Utilase has come forward with no evidence, as it must, that defendant misappropriated any trade secrets.

While the first case was still pending, Utilase, along with its then parent DCT, filed the instant matter against Olympic Steel. Counts II (misappropriation of trade secrets) and V (injunctive relief) of the

present complaint are almost verbatim to the corresponding counts in the first complaint. The first complaint alleged that "Utilase divulged to Mr. Williamson numerous trade secrets involved in its complex welding processes," and "Mr. Williamson ... misappropriated these trade secrets by sharing them with Utilase's competitor [Olympic Steel]." The misappropriation count in this case alleges that "Utilase divulged to Mr. Williamson numerous trade secrets involved in its complex welding processes," and "Olympic misappropriated Utilase trade secrets by hiring Mr. Williamson for the purpose of gaining access to Utilase trade secrets and by knowingly using Utilase trade secrets to compete with Utilase." Because the court already ruled on Utilase's misappropriation of trade secrets theory, Olympic Steel contends that res judicata and collateral estoppel should bar relitigation of the issue. The court agrees.

In addition, Olympic Steel also argues that relitigation of Utilase's claim for injunctive relief should be barred. The first complaint sought to enjoin Williamson "from disclosing Confidential Information or from rendering services to any corporation to which this Confidential Information has been disclosed." The second complaint seeks to enjoin "Olympic, among other things, from using or disclosing Utilase's confidential information or from employing or using the services of Mr. Williamson in any capacity." In the previous case, Utilase successfully enjoined Williamson from disclosing confidential information and rendering any laser blank welding services to Olympic, but only for a period of one year after his employment terminated with Utilase. The injunction expired on November 8, 1997. Utilase argued that the injunction should be extended, but the court refused because the "parties' agreement contemplated that

defendant could not use or disclose the confidential information he gained at Utilase for a period of one year after he left the company, and because nothing suggests that Utilase suffered actual damages as a result of defendant's breach."

Now, Utilase is again asking for injunctive relief to prohibit Williamson from working for Olympic or sharing trade secrets with Olympic. This is the same injunctive relief that Utilase already asked for, and the court issued a final judgment granting the injunction for one year but denying it for any longer period. Because that year has passed, Utilase may not relitigate the issue of whether the injunction should extend beyond a year. In fact, in response to Olympic's motion for partial summary judgment, plaintiffs do not even contest the argument that its injunction claim should be dismissed based on res judicata and collateral estoppel.

For reasons of judicial economy, equity, fairness in administration of justice, and public policy, courts repeatedly hold that a litigant is entitled to one opportunity to assert its claims. Thus, pursuant to the doctrine of res judicata, or claim preclusion, a "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981); accord Westwood Chem. Co., Inc. v. Kulick, 656 F.2d 1224, 1227 (6th Cir. 1981) (res judicata "bars relitigation on every issue actually litigated or which could have been raised with respect to that claim").

To constitute a bar, the previous case must have resulted in a final judgment on the merits, must have involved the same parties or their privies, and must have involved the same transaction.

Westwood, 656 F.2d at 1227. These requirements are met here. First, a final judgment on the merits was entered against Utilase in the first lawsuit. The court specifically stated that "because all of plaintiffs claims have now been ruled upon, this case hereby is CLOSED." Indeed, Utilase appealed that order, thereby acknowledging that it was a final judgment. Res judicata, and collateral estoppel are applicable to the judgments even if an appeal is pending. In re Dublin Sec., Inc., 133 F.3d 377, 381 (6th Cir. 1997) (...a final judgment retains all of its preclusive effect pending appeal.").

Next, with respect to the trade secret and injunction counts, even though Olympic Steel was not a party in the first suit, the relationship between Williamson and Olympic Steel epitomizes the definition of privity. See In re Gottheiner, 703 F.2d 1136, 1140 (9th Cir. 1983) (privity exists when there is substantial identity and commonality of interests). Moreover, it is widely held that the employer-employee relationship provides the requisite privity for claim and issue preclusion. "Most ... federal circuits have concluded that employer-employeeor principal-agentrelationshipsmay ground a claim preclusion defense, regardless which party to the relationship was first sued." Lubrizol Corp. v. Exxon Corp., 871 F.2d 1279, 1288 (5th Cir. 1989); see also Russell v. SunAmerica Sec., Inc., 962 F.2d 1169, 1174 (5th Cir. 1992). Clearly, with regard to the trade secret and injunction counts in the two cases, Williamson and Olympic Steel share a substantial identity and commonality of interests. In fact, Utilase's own pleadings assert that Williamson and Olympic Steel were intimately bound together in a common enterprise.

Finally, the misappropriation of trade secrets and injunction counts in both cases are predicated on the same underlying

transaction or series of transactions. In other words, there exists "an identity of the facts creating the right of action and of the evidence necessary to sustain each action." Westwood, 656 F.2d at 1227; see also Woods v. Dunlop Tire Corp., 972 F.2d 36, 39 (2d Cir. 1992), cert. denied, 506 U.S. 1053 (1993) (plaintiff cannot advance the same or even a different legal theory when the factual predicate upon which the claims are based are substantially identical). Utilase has conceded that the cases involve the same transaction by certifying on the face of its present complaint that it filed a prior lawsuit "arising out of the same transaction or occurrence alleged in the complaint."

Moreover, the existence of "new or previously unavailable" evidence does not render res judicata inappropriate, as Utilase urges. If the application of res judicata could be so easily trumped by conclusory allegations of new evidence, the doctrine would be eviscerated. Thus, relief from a prior judgment is only available if there has been such "a substantial change in circumstances" that giving continued effect to the judgment would be unjust. Stone v. Williams, 970 F.2d 1043, 1055 (2d Cir. 1992), cert. denied, 508 U.S. 906 (1993). Utilase has not identified any substantial change in circumstances. Accordingly, res judicata bars relitigation of the claims for misappropriation of trade secrets and injunctive relief..

Furthermore, these claims are also barred by collateral estoppel or issue preclusion. Pursuant to this doctrine, "the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n.5 (1979); accord Aircraft Braking Sys. Corp. v. Local 856, UAW, 97 F.3d 155, 161 (6th Cir. 1996), cert. denied, 117 S.Ct. 1311 (1997). Even if the defendant in the second case does not enjoy privity with the defendant in a prior case,

collateral estoppel prohibits the plaintiff from relitigating an issue against the new defendant. Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 322-23 (1971).

Collateral estoppel bars relitigation of an issue if: (1) the issue raised in the present case was actually litigated in the prior case; (2) determination of the issue was necessary to the outcome; (3) there was a final judgment on the merits; and, (4) the party against whom estoppel is sought had a full and fair opportunity to litigate the issue in the prior case. Aircraft Braking Sys., 97 F.3d at 161; NAACP v. Detroit Police Officers Ass'n, 821 F.2d 328, 330 (6th Cir. 1987).

The successive lawsuits by Utilase provide a classic setting for the application of issue preclusion. Utilase already raised and litigated the misappropriation of trade secrets and injunction issues. Also, the determination of the issues was necessary to the outcome of the first case and finished the case. Next, this court clearly entered a final judgment on the merits. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (a final judgment is one that "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment'"). Lastly, Utilase had a full and fair opportunity to litigate the issues. Therefore, Utilase's claims of misappropriation of trade secrets and injunctive relief are barred by collateral estoppel.

For the reasons stated above,

IT IS ORDERED that defendant's motion for partial summary judgment as to Counts II (misappropriation of trade secrets) and V (injunctive relief) hereby is GRANTED.

IT IS FURTHER ORDERED that defendant's June 22, 1998, motion for expedited hearing hereby is DISMISSED AS MOOT.

IT IS FURTHER ORDERED that plaintiffs' June 15, 1998, motion to compel "discovery information [that] goes to the heart of DCT's misappropriation of trade secret claim against Olympic" hereby is DISMISSED AS MOOT.

IT IS FURTHER ORDERED that defendant's June 26, 1998, motion for protective order hereby is GRANTED. No inquiry at the depositions of Mark Williamson and James Hurley shall be made regarding Utilase's claims of misappropriation of trade secrets and injunctive relief.

IT IS FURTHER ORDERED that defendant's July 1, 1998, motion to compel answers to interrogatories (trade secrets) hereby is DISMISSED AS MOOT.

IT IS FURTHER ORDERED that plaintiffs shall respond to defendant's motion to strike affidavit of John Baysore and defendant's two remaining motions to compel (to the extent the discovery sought does not concern Counts II and V of plaintiffs' complaint) on or before July 21, 1998.

BARBARA K. HACKETT
United States District Judge
Dated: July 10, 1998.

UTILASE, INC., Plaintiff-Appellant/Cross-Appellee, v. MARK S. WILLIAMSON, Defendant-Appellee/Cross-Appellant.

Nos. 98-1233; 98-1320

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1999 U.S. App. LEXIS 22452

September 10, 1999, Filed

NOTICE:

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 206 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 206 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY. Reported in Table Case Format at: 1999 U.S. App. LEXIS 28269.

PRIOR HISTORY. ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. 97-60001. Hackett. I28-98.

DISPOSITION: AFFIRMED.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff and defendant appealed order from the United States District Court for the Eastern District of Michigan granting summary judgment for defendant on plaintiff's

claim of misappropriation of trade secrets and finding defendant in contempt for violating injunction.

OVERVIEW. Plaintiff filed suit against defendant alleging breach of contract, misappropriation of trade secrets, tort claims, claim for injunctive relief, and violation of the Federal Racketeer Influenced and Corrupt Organizations Act (RICO). Plaintiff appealed order granting defendant's motion for partial summary judgment on claim of misappropriation of trade secrets. Plaintiff failed to preserve this issue. Plaintiff also argued on appeal that it had adduced sufficient information to establish a genuine issue for the trier of fact on the question of whether there was a significant threat that defendant would use or disclose information. In applying Michigan law, the court determined that there were no issues of genuine fact. There was no error in granting summary judgment when plaintiff failed to articulate a protectable trade secret. Finally, district court did not abuse its discretion in holding defendant in contempt for violating the district court's preliminary injunction.

OUTCOME: Order granting defendant's motion for partial summary judgment of plaintiff's complaint for misappropriation of trade secrets affirmed; plaintiff failed to preserve issue and there were no issue of genuine fact; district court did not abuse discretion in holding defendant in contempt for violating injunction.

CORE TERMS: preliminary injunction, laser, contempt, welding, blank, summary judgment, trade secrets, confidential information, confidentiality agreement, trade secret, competitor, injunction, compete, joint venture, one year, permanent injunction, misappropriation, injunctive relief, non-compete, inasmuch, protectable,

violating, partial, cross-appeal, twenty-three, ambiguous, plant, civil contempt, invention, confidentiality

CORE CONCEPTS -

Civil Procedure: Summary Judgment or Summary Adjudication
Civil Procedure: Appeals: Standards of Review: De Novo Review
A court reviews a motion for summary judgment brought pursuant to Fed. R. Civ. P. 56 de novo.

Civil Procedure: Summary Judgment or Summary Adjudication: Summary Judgment Standard
Summary judgment is appropriate where no genuine issue of material fact remains for trial and the moving party is entitled to judgment as a matter of law. The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-moving party's case.

Labor & Employment Law: Trade Secrets & Unfair Competition
In Michigan, to succeed on a claim for misappropriation of a trade secret, a plaintiff must prove the following elements by a preponderance of the evidence: 1) the existence of a trade secret; 2) its acquisition in confidence; and 3) the defendant's unauthorized use of it.

Labor & Employment Law: Trade Secrets & Unfair Competition
The Michigan courts have defined "trade secret" as that which consists of any valuable formula, pattern, device, process, or other information that is used in one's business and gives the possessor a competitive advantage over those who do not know or use the information.

Labor & Employment Law: Trade Secrets & Unfair Competition
The Michigan courts have looked to these factors as a guideline for determining whether particular information is a trade secret: (1) the extent to which the information is known outside his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort of money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Another factor the Michigan courts consider in determining the existence of a protectable trade secret is whether the information is embodied or capable of being embodied in concrete form. Finally, the Michigan courts have found that an alleged trade secret must be identified clearly, unambiguously, and with specificity.

Labor & Employment Law: Trade Secrets & Unfair Competition
There must be evidence presented that sufficient measures have been taken to guard the secrecy of the information and preserve its confidentiality. Such measures generally include an express agreement, disclosure to another in confidence or utilization of security precautions. The term trade secret does not encompass information which is readily ascertainable.

Civil Procedure: Entry of Judgments: Specific Acts
Civil Procedure: Appeals: Standards of Review: Abuse of Discretion
A court reviews a district court's finding of civil contempt for an abuse of discretion. An abuse of discretion may be found when the district court relied upon clearly erroneous findings of fact. In examining findings of fact, this court may reverse only if after a review of all the evidence the court is left with a firm and definite

conviction that a mistake has been made. Furthermore, where two views are permissible in light of the evidence, the fact finder's choice between them cannot be clearly erroneous.

Civil Procedure: Entry of Judgments: Specific Acts

The movant in a civil contempt proceeding bears the burden of proving by clear and convincing evidence that the respondent violated a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order. This is a heavy burden of proof which requires more than proof by a preponderance of the evidence.

Civil Procedure: Entry of Judgments: Specific Acts

In contempt proceedings, the basic proposition is that all orders and judgments of courts must be complied with promptly. The power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. A litigant may be held in contempt if his adversary shows by clear and convincing evidence that he violated a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order.

Civil Procedure: Entry of Judgments: Specific Acts Civil Procedure: Appeals: Standards of Review

In addition to finding that the prior court order which the litigant is alleged to have violated must be definite and specific in nature, a court has embraced the standard used by other circuits that the prior order must be clear and unambiguous as well.

Civil Procedure: Entry of Judgments: Specific Acts

Civil contempt sanctions are designed to enforce compliance with court orders and to compensate injured parties for losses sustained.

Civil Procedure: Entry of Judgments: Specific Acts Constitutional Law: Procedural Due Process
A civil contemner is entitled to the procedural safeguards afforded by the due process clause: proper notice and an impartial hearing with an opportunity to present a defense.

COUNSEL: For UTILASE, INC. , Plaintiff - Appellant Cross-Appellee (98-1233, 98-1320): Rodger D. Young, Steven C. Susser, Young & Associates, Southfield, MI.

For MARK S. WILLIAMSON, Defendant Appellee Cross-Appellant (98-1233, 98-1320): Mark T. Boonstra, Larry J. Saylor, Michael C. Fayz, Miller, Canfield, Paddock & Stone, Detroit, MI.

JUDGES: BEFORE: RYAN, BATCHELDER, & CLAY, Circuit Judges. RYAN and BATCHELDER, Circuit Judges, Concurring in part.

OPINION BY CLAY

OPINION: CLAY, Circuit Judge. Plaintiff-Appellant/Cross-Appellee, Utilase, Inc. , appeals from the district court's order granting partial summary judgment to Defendant-Appellee/Cross-Appellant, Mark S. Williamson, on Plaintiff's claim for misappropriation of trade secrets. Defendant[*2] cross-appeals from the district court's order granting. Plaintiff costs and attorneys fees in relation to Defendant's contemptuous conduct. For the reasons set forth below, the district court's order granting Defendant's motion

for partial summary judgment is AFFIRMED, and the separate concurrence filed in relation to this case sets forth the Court's disposition of Defendant's cross-appeal of the district court's order granting Plaintiff costs and attorney's fees.

BACKGROUND

Procedural History

Plaintiff filed suit against Defendant on December 10, 1996, in Michigan's Wayne County Circuit Court in a five-count complaint which alleged as follows: (1) breach of contract for confidentiality; (2) misappropriation of trade secrets; (3) tortious interference with Plaintiff's contractual relations; (4) a claim for injunctive relief to enjoin Defendant from disclosing Plaintiff's confidential information in violation of the confidentiality agreements; and (5) violation of the Federal Racketeer Influenced and Corrupt Organizations Act ('RICO').

Plaintiff filed a motion for a temporary restraining order in the state court on December 13, 1996. The court issued an order to[*3] show cause why a preliminary injunction should not be granted against Defendant and scheduled an evidentiary hearing. The court conducted the evidentiary hearing on December 17, 1996, and granted Plaintiff a one-year preliminary injunction; however, while the parties were memorializing the court's decision, Defendant removed the suit to the United States District Court for the Eastern District of Michigan on January 2, 1997. Plaintiff filed an emergency motion for entry of order before the district court on January 16, 1997, seeking entry of an order granting the preliminary injunction that Plaintiff sought against Defendant in state court. The

next day, January 17, 1997, the district court heard oral argument and granted Plaintiff's motion for entry of the preliminary injunction.

Thereafter, on April 9, 1997, Defendant informed opposing counsel and the court that he had found a confidential list of twenty-three items belonging to Plaintiff in his house. Defendant claimed that he had previously deleted the document from his computer disk, but had apparently retained a hard copy inadvertently and returned it to Plaintiff upon discovery of the document. In the meantime, Defendant began[*4] working as a liaison to the contractor who was building the facility which would ultimately house the joint venture between Olympic and U.S. Steel. Because of the document discovered by Defendant in his home, as well as his association with the construction project, the district court held a hearing on April 16, 1997, requiring Defendant to show cause why he should not be held in contempt for violating the preliminary injunction.

At the evidentiary hearing, the district court inquired into Defendant's work on the construction of the laser blank welding plant, and Defendant responded that he had made recommendations as to the design of the plant and that the purpose of the plant was to produce laser blank welds. With this, and several other responses from Defendant regarding his involvement with the construction of the plant, the district court determined that Defendant was in violation of the preliminary injunction inasmuch as Defendant was drawing on the confidential information he learned while working for Plaintiff, and was using the information to service a competitor by providing advice in the construction of the plant which would house the laser welding operation for the joint[*5] venture between Olympic, Steel, Inc. ("Olympic") and U.S. Steel. Accordingly, the district court found Defendant in contempt of the preliminary

injunction, and issued a contempt order which stated in pertinent part as follows:

1. Defendant Mark Williamson is found in contempt of the Court's January 17, 1997 Order Granting Preliminary Injunction.

2. Defendant may not be employed in any capacity unless he is able to demonstrate to the satisfaction of Plaintiff Utilase, Inc. that his employment does not involve laser blank welding. Plaintiff may not unreasonably withhold approval of Defendant's proposed employment.

3. Defendant shall conduct a careful search of his business records for information relating to Utilase, Inc. laser blank welding. This search shall include all records in documentary form or stored in Defendant's computer system; it will specifically include a search for log books kept by Defendant while he was working at Utilase. Defendant shall produce all information relating to Utilase's laser blank welding discovered during this search to his counsel. Defendant shall further prepare an affidavit setting forth the Utilase information discovered during [*6] the search and its status. If Defendant finds no relevant information, he shall indicate this in his affidavit.

(J.A. at 49.) Defendant filed a motion for reconsideration of the district court's contempt order, which the court denied on May 20, 1997.

Plaintiff filed a motion for partial summary judgment on Count 1, the breach of contract claim, as well as on Count 4, the claim for injunctive relief. Thereafter, on May 14, 1997, Defendant filed a

motion to dissolve the preliminary injunction and for partial summary judgment as to Counts 1 and 4 of Plaintiff's complaint. The district court entered an order on July 17, 1997, granting Plaintiff's motion, and denying Defendant's motion, and enjoined Defendant from using any of Plaintiff's confidential information as defined in the confidentiality agreement, until November 8, 1997. On July 25, 1997, Plaintiff filed a motion for voluntary dismissal without prejudice of the remaining counts, stating as follows:

> In many cases, a party wants to dismiss its claims because it is losing. In this case, Utilase wants to dismiss its remaining claims because it has won. Utilase has accomplished what it set out to achieve. It has made permanent [*7]an injunction on Mr. Williamson that will prevent him from flouting his Confidentiality Agreement. Although Utilase would have preferred that the injunction be for a longer period of time, it has essentially achieved the relief that it needed to achieve from Mr. Williamson.
>
> (J.A. at 1404-05.)

The district court denied Plaintiff's motion to dismiss without prejudice, and Defendant thereafter filed a motion for partial summary judgment as to Counts 3 and 5 (tortious interference with contract and RICO counts). The district court granted Defendant's motion, and issued an order dismissing Counts 3 and 5 from the suit. On July 16, 1997, Defendant filed a motion for partial summary judgment on Count 2, misappropriation of trade secrets; the district court granted Defendant's motion; and entered an order dated January 26, 1998, dismissing Count 2 and the lawsuit. Plaintiff now appeals from the district court's order dismissing Count 2, the misappropriation of trade secrets claim.

In its July 25, 1997 motion for voluntary dismissal of the remainder of its claims, Plaintiff also sought costs and attorney's fees associated with Defendant's contemptuous conduct in failing to abide by[*81 the mandates of the preliminary injunction. The court took the matter under advisement, and entered an order dated January 26, 1998, granting Plaintiff's motion and assessing costs and attorney's fees to Plaintiff in the amount of $2,186.45. It is from this order that Defendant now cross-appeals.

Facts

Plaintiff is in the business of using laser technology to weld sheet metal blanks, which are then supplied principally to the automobile industry and stamped into form. This business, known as laser welding, is highly specialized, relatively new, and very competitive. Defendant was employed by Plaintiff as the second in command during his employment with Plaintiff from the beginning of 1990 through November 8, 1996. Defendant's position afforded him complete access to all of Plaintiff s trade secrets and confidential terminology in that he was jointly responsible for researching, developing and implementing a successful laser blank welding system.

Because of his accessability to Plaintiff's confidential information, Defendant was asked and agreed to sign a confidentiality agreement on January 29, 1990, and then a second nearly identical agreement on March 15, 1990 ("the [*9] Agreement"). The nondisclosure provision of the Agreement is limited to confidential information, and was enforceable for one year after the promisor's (Defendant's) relationship with Plaintiff ceased.

In a letter dated October 29, 1996, Defendant announced his resignation from Plaintiff, explaining that he had "agreed to accept a job offer to manage the laser blank welding joint venture between Olympic and U.S. Steel." Olympic and U.S. Steel were in the process of forming their joint venture, which would ultimately use laser blank welding technology and would be Plaintiff's competitor. Defendant's last day of employment with Plaintiff was on November 8, 1996, and he began working for Olympic on November 11, 1996.

Through counsel, Plaintiff sent a letter to Defendant dated November 13, 1996, informing him that he had breached the terms of his Agreement with Plaintiff, however, Defendant did not respond to this letter. Plaintiff's Vice President, John Baysore, discovered on December 9, 1996 that Defendant had removed confidential information from Plaintiff's premises including drawings, computer diskettes, business plans, and financial analyses. This discovery led to Plaintiff filing [*10] the instant suit against Defendant in state court.

DISCUSSION

I. Appeal from the District Court's Order Granting Defendant Summary Judgment on Plaintiff's claim for Misappropriation of Trade Secrets

This Court reviews a motion for summary judgment brought pursuant to Fed. R. Civ. P. 56 de novo. Johnson v. Hills & Dales Gen. Hosp., 40 F.3d 837, 839 (6th Cir. 1994). Summary judgment is appropriate where no genuine issue of material fact remains for trial and the moving party is entitled to judgment as a matter of law. Id. The moving party has the initial burden of showing the absence

of a genuine issue of material fact as to an essential element of the non-moving party's case. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476 (6th Cir. 1989) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Once the moving party satisfies its burden, "the burden shifts to the nonmoving party to set forth specific facts showing a triable issue." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348, S. Ct. 1348 (1986).

Plaintiff argues* 11] that the district court applied the wrong legal standard in concluding that Plaintiff had failed to present any evidence from which a jury could conclude that Defendant had used or disclosed a specific protectable trade secret. Plaintiff contends that this Court's decision in Uniroyal Goodrich Tire Co. v. Hudson, 1996 U.S. App. LEXIS 25322, No. 951130, 1996 WL 520789 (6th Cir. Sept. 12, 1996) (unpublished per curiam), is "particularly instructive" in showing that the district court impermissibly required Plaintiff to adduce evidence from which a jury reasonably could conclude that defendant used or disclosed a specific protectable trade secret, inasmuch as under Uniroyal, Plaintiff was required only to adduce evidence indicating a "significant threat" that Defendant would use or disclose Plaintiff's confidential information.

We are not persuaded by Plaintiff's argument. Plaintiff adopted the "significant threat" standard from the standard used by a court in determining whether to grant an injunction. That is to say, Plaintiff is arguing that the district court should have analyzed Defendant's motion for summary judgment under the standard used to analyze a request for injunctive relief. [*12] n1 Plaintiff's argument, however, is ill-conceived inasmuch as Plaintiff did not raise this argument in response to Defendant's motion for summary judgment

on Count 2, and did not challenge the district court's decision granting the injunctive relief for a twelve-month period in relation to Plaintiff's breach of contract claim. In fact, in its voluntary motion to dismiss the remaining claims without prejudice, Plaintiff averred that "although Utilase [Plaintiff] would have preferred that the injunction be for a longer period of time, it has essentially achieved the relief that it needed to achieve from Mr. Williamson [Defendant]." Accordingly, Plaintiff's failure to raise this challenge to the district court in response to Defendant's motion for summary judgment, as well as Plaintiff's failure to challenge the length of the twelve-month preliminary injunction, renders Plaintiff's claim unpreserved for appellate review. See Wayne County Neighborhood Legal Servs. v. National Union Fire Ins. Co., 971 F.2d 1, 3 (6th Cir. 1992) (recognizing that it is this Court's general policy not to consider arguments or issues which were not raised before the district court when [*13] it adjudicated a motion for summary judgment); White v. Anchor Motor Freight, Inc., 899 F.2d 555, 559 (6th Cir. 1990) (finding that "this court will not decide issues or claims not litigated before the district court" and that this court "reviews the case presented to the district court rather than a better case fashioned after the district court's decision").

nl See Uniroyal, 1996 WL 520789, at **8 (finding that "in seeking a permanent injunction, a party must make a clear showing of a significant threat that irreparable injury will result if relief is not granted, and that no other adequate legal remedy is available").

Notably, the case upon which Plaintiff relies in support of its contention that the district court applied the wrong standard in adjudicating Defendant's motion for summary judgment, Uniroyal Goodrich Tire Co. v. Hudson, 1996 WL 520789, at **4, is

distinguishable in that there, this Court specifically noted that it was reviewing the district [*14] court's issuance of a permanent injunction; hence, the Court applied the standard of review applicable to a permanent injunction. In Uniroyal, the district court issued a preliminary injunction enjoining the defendant from disclosing the plaintiff's confidential information; the defendant brought a pretrial motion for summary judgment, which the district court denied; a bench trial ensued where the district court found that the defendant had breached his nondisclosure agreement with the plaintiff and that there was a threat that the defendant would continue to do so in the future; and, as such, the district court granted the plaintiff a permanent injunction. Id. at **3.

Thereafter, the defendant appealed to this Court raising three arguments: 1) that the district court erred in denying his pretrial motion for summary judgment; 2) that the district court improperly held him in contempt for violating the preliminary injunction; and 3) that the district court erred in granting the permanent injunction. Uniroyal, 1996 WL 820789, at **4. In analyzing the defendant's first claim, that the district court erred in denying his pretrial motion for summary judgment, [*15] this Court stated as follows:

Normally, a denial of summary judgment, followed by a full trial on the merits of an action is not properly reviewable on an appeal from the final judgment entered after trial. Here, however, the legal and factual issues raised in [the defendant's] motion for summary judgment were presented and argued during the bench trial of this case. Resolution of these issues was necessary for the district court's decision to grant a permanent injunction. Defendant has properly appealed the issuance of the permanent injunction. Accordingly, we ultimately will address the issues raised in [the defendant's) motion

for summary judgment in the course of this opinion. However, we characterize our review as determining whether the district court erred in issuing the permanent injunction after holding a bench trial, rather than determining whether the court erred in denying the defendant's motion for summary judgment.

Id. This Court then went on to analyze the defendant's next two claims, and in adjudicating whether the district court properly granted a permanent injunction, the Court applied the "threat that irreparable injury will result if relief is [*16] not granted" standard attendant to determining injunctive relief. Id. at **8. However, unlike in Uniroyal, here Plaintiff is directly appealing from the district court's order granting Defendant summary judgment. Accordingly, the proper standard to be applied is, just as Plaintiff argued below, whether a genuine issue of material fact remained for trial on the elements of Plaintiff's claim for misappropriation of trade secrets. See Johnson , 40 F.3d at 839; Street, 886 F.2d at 1476.

Plaintiff s next argument appears to combine the standard set forth for determining whether injunctive relief should be granted, with the standard of review applicable to a motion for summary judgment. Specifically, Plaintiff argues that "the pertinent question on appeal is whether [Plaintiff] had adduced sufficient information to establish a genuine issue for the trier of fact on the question of whether there was a significant threat that [Defendant] would use or disclose this information." To the extent that Plaintiff is arguing that a question of fact remained as to whether Defendant misappropriated Plaintiff's trade secrets, we disagree.

In Michigan, to [*17] succeed on a claim for misappropriation of a trade secret, a plaintiff must prove the following elements by a

preponderance of the evidence: 1) the existence of a trade secret; 2) its acquisition in confidence; and 3) the defendant's unauthorized use of it. Rothschild v. Ford Motor Comp., 2 F. Supp. 2d 941, 950 (E.D. Mich. 1998) (citing Aerospace America, Inc. v. Abatement Techs., 738 F. Supp. 1061, 1069 (E.D. Mich. 1990)). The rationale behind the tort of misappropriation of trade secrets is 'to maintain standards of commercial ethics and encourage invention.'" Rothschild, 2 F. Supp. 2d at 950 (quoting Wayne State Univ. v. Bronstein, No. 88-804-627- CK, 1994 WL 854863, at **55 (Mich. Cir. Ct. Aug. 5, 1994)).

The Michigan courts have defined "trade secret" as that which "'consists of any valuable formula, pattern, device, process, or other information that is used in one's business and gives the possessor a competitive advantage over those who do not know or use the information.'" Rothschild, 2 F. Supp. 2d at 950 n. 12 (quoting Kubik, Inc. v. Hull, 56 Mich. App. 335, 224 N.W.2d 80 (Mich. Ct. App. 1974)). [*18] The Michigan courts have looked to the factors set forth in the Restatement as a guideline for determining whether particular information is a trade secret:

"(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort of money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

Hayes-Albion v. Kuberski, 421 Mich. 170, 364 N.W.2d 609, 614 (Mich. 1985) (quoting The Restatement of Torts, § 757, Comment b). Another factor the Michigan courts consider in determining the existence of a protectable trade secret is whether the information is embodied or capable of being embodied in concrete form. Manos v. Melton, 358 Mich. 500, 100 N.W.2d 235, 238 (Mich. 1960).

Finally, the Michigan courts have found that an alleged trade secret must be identified "clearly, unambiguously, and [*19] with specificity." Shatterproof Glass Corp. v. Guardian, Glass Co., 322 F. Supp. 854, 867 (E.D. Mich. 1970), aff'd, 462 F.2d 1115 (6th Cir.), cert denied, 409 U.S. 1039, 34 L. Ed. 2d 487, 93 S. Ct. 518 (1972). The Michigan courts have noted the following regarding the proof that a plaintiff must present in order to establish that the information was a trade secret:

There must be evidence presented that sufficient measures have been taken to guard the secrecy of the information and preserve its confidentiality. Such measures generally include an express agreement, disclosure to another in confidence or utilization of security precautions. The term trade secret does not encompass information which is readily ascertainable.

Rothschild, 2 F. Supp. 2d at 950 (citations and internal quotation marks omitted).

However, in Michigan, "an employee is entitled to the unrestricted use of general information acquired during the course of his employment or information generally known in the trade or readily ascertainable...."Follmer, Rudzewicz & Co., P.C., v. Kosco,

420 Mich. 394, 362 N.W.2d 676, 680 (Mich. 1984).[*20] The Follmer Court also recognized the following:

"It has been uniformly held that general knowledge, skill, or facility acquired through training or experience while working for an employer appertain exclusively to the employee. The fact that they were acquired or developed during the employment does not, by itself, give the employer a sufficient interest to support a restraining covenant, even though the on-the-job training has been extensive and costly."

Id. at 681 n.4 (quoting Blake, Employment Agreements Not to Compete, 73 HARV. L. REV. 625, 652 (1960)).

Here, Defendant argues, and the district court agreed, that Plaintiff's claim fails at the inception in that Plaintiff refused to articulate any specific protectable trade secrets. Defendant argues that Plaintiff was deliberately vague in describing what it considered to be protectable trade secrets at issue, and merely alleged that Defendant took the knowledge and experience which he gained from working for Plaintiff, which Defendant claims is not considered protected as trade secrets.

On appeal, Plaintiff argues that it identified eight separate occasions upon which Defendant used or disclosed[*21] its "confidential information," among which was an instance where Plaintiff claimed that Defendant admitted to discussing a list containing twenty-three of Plaintiff's trade secrets with a representative of Plaintiff's competitor, Olympic. However, Plaintiff's assertion that the list contained twenty-three trade secrets does not thereby render the items as "trade secrets" under Michigan

law. See Rothschild, 2 F. Supp. 2d at 950. Although a review of the list indicates that the items are characterized as "Utilase Blank Welding Trade Secrets," once again, this label attached to the list of items does not render the items "trade secrets." See id. Furthermore, during the deposition testimony of John K. Baysore, Plaintiff's Vice-President, defense counsel attempted to ascertain the nature of these alleged twenty-three trade secrets; however, counsel for Plaintiff objected, particularly to defense counsel characterizing the items as "confidential information." Moreover, Defendant testified at his deposition that although he discussed the list in question with a representative from Olympic, he did not disclose any of the information therein to the representative. Plaintiff [*22] has failed to come forward with evidence to create a question of fact as to whether it articulated a protectable trade secret under Michigan law.

As to the other instances of alleged use of trade secrets to which Plaintiff refers in its brief on appeal, we find that these instances do not create a genuine issue of fact as to whether Defendant misappropriated a "trade secret." Plaintiff contends that the information to which it refers is "confidential," as evidenced by the Agreement Defendant entered into with Plaintiff. However, while such evidence may have been relevant to the district court granting Plaintiff summary judgment on Count 1 (breach of contract claim) and imposing the injunctive relief, the evidence fails to establish a genuine issue of fact regarding Plaintiff's claim on Count 2 (misappropriation of a trade secret) inasmuch as Plaintiff failed to state with specificity a protected trade secret. See Shatterproof Glass Corp., 322 F. Supp. at 867 (trade secret must be identified with clarity and specificity).

For example, Plaintiff claims that Defendant's conversation with Olympic as to why the edges of steel that was to be welded should be prepared internally; [*23] his conversation with Olympic as to the way Plaintiff prepares the edges of the metal that it intends to weld; as well as his conversations with Olympic after he left Plaintiff's employ regarding various aspects of Plaintiff's laser welding operation all involved confidential information. However, as stated, while this may have been persuasive evidence for determining breach of the Agreement, it does not establish a question of fact regarding "trade secrets." As found by the district court, "'knowledge,' 'information,' and 'experience' are not 'trade secrets,' and the fact that defendant may 'draw[] upon Utilase's [Plaintiff's] confidential information' at his new job is not evidence that there has been or will be any disclosure of 'trade secrets.'"

In summary, we find that the basis upon which Plaintiff argues its claim on appeal -- that the district court applied the wrong legal standard in adjudicating Defendant's motion for summary judgment -- is unpreserved inasmuch as Plaintiff failed to allege this argument at the district court level and failed to challenge the district court's decision to grant a truncated injunction. Furthermore, we find that when considering Plaintiff's [*24] claim on the merits, the district court did not err in granting Defendant's motion for summary judgment where no genuine issue of fact remains for trial that Plaintiff failed to articulate a protectable trade secret.

B. Cross-Appeal from the District Court's Order Finding Defendant in Contempt

This Court reviews a district court's finding of civil contempt for an abuse of discretion. Harrison v. Metropolitan Gov't of Nashville,

80 F.3d 1107, 1112 (6th Cir. 1996). An abuse of discretion may be found when the district court relied upon clearly erroneous findings of fact. Id. (citing Southward v. South Central Ready Mix Supply Corp., 7 F.3d 487, 492 (6th Cir. 1993)). In examining findings of fact, this Court may reverse only if after a review of all the evidence the Court is left with a firm and definite conviction that a mistake has been made. Id. (citing Anderson v. City of Bessemer, 470 U.S. 564, 573, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985)). Furthermore, where two views are permissible in light of the evidence, the fact finder's choice between them cannot be clearly erroneous. Id. (citing Anderson, 470 U.S. at 574).[*25]

The movant in a civil contempt proceeding bears the burden of proving by clear and convincing evidence that the respondent "violated a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." Glover v. Johnson , 934 F.2d 703, 707 (6th Cir. 1991) (citation omitted). This is a heavy burden of proof which requires more than proof by a preponderance of the evidence. Consolidation Coal Co. v. Local No. 1784, United Mine Workers of Am., 514 F.2d 763, 766 (6th Cir. 1975).

In NLRB v, Cincinnati Bronze, Inc., this Court spoke on issue of civil contempt proceedings, and stated as follows:

In contempt proceedings, the basic proposition is that all orders and judgments of courts must be complied with promptly. The power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. A litigant may be held in contempt if his adversary shows by clear and

convincing evidence that "he violated a definite and specific order of the court [*26] requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order.

829 F.2d 585, 590-91 (6th Cir. 1987) (citations, internal quotation marks, and alteration marks omitted). In addition to finding that the prior court order which the litigant is alleged to have violated must be definite and specific in nature, this Court has embraced the standard used by other circuits that the prior order must be "clear and unambiguous" as well. Grace v. Center for Auto Safety, 72 F.3d 1236, 1241 (6th Cir. 1996) (citing Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 16 (1st Cir. 1991) (collecting cases)). "'Unbroken lines of authority ... caution us to read court decrees to mean rather precisely what they say,' and ambiguities must be resolved in favor of persons charged with contempt." Grace, 72 F.3d at 1241 (quoting NBA Properties, Inc. v. Gold, 895 F.2d 30, 32 (1st Cir. 1990) (Breyer, J.)).

Here, the district court's January 17, 1997, preliminary injunction provided in pertinent part as follows:

NOW THEREFORE, IT IS ORDERED, that for the reasons set forth on the [*27] record, Mark Williamson [Defendant] is ENJOINED until November 8, 1997 or during the pendency of the above-captioned action, whichever is shorter, from the following:

1. Communicating, using, or disclosing in whole or in part, any Confidential Information, Invention, or Confidential Document, all as defined in the March 15, 1990 Confidentiality Agreement;

2. Rendering any service involving laser blank welding to any person, partnership, corporation, or organization; and

3. Retaining, removing, copying, or destroying any Confidential Document or Invention, all as defined in the March 15, 1990 Confidentiality Agreement, or product of Utilase, Inc. [Plaintiff].

(J.A. at 287-88.)

The order finding Defendant in contempt of the preliminary injunction provides in pertinent part as follows:

1. Defendant Mark Williamson is found in contempt of the Court's January 17, 1997 Order Granting Preliminary Injunction.

2. Defendant may not be employed in any capacity unless he is able to demonstrate to the satisfaction of Plaintiff Utilase, Inc. that his employment does not involve laser blank welding. Plaintiff may not unreasonably withhold approval of Defendant's [*28] proposed employment.

3. Defendant shall conduct a careful search of his business records for information relating to Utilase, Inc. laser blank welding. This search shall include all records in documentary form or stored in Defendant's computer system; it will specifically include a search for log books kept by Defendant while he was working at Utilase. Defendant shall produce all information relating to Utilase's laser blank welding discovered during this search to his counsel. Defendant shall further prepare an affidavit setting forth the Utilase information discovered during the search and its status. If Defendant finds no relevant information, he shall indicate this in his affidavit.

(J.A. at 287-88.)

On appeal, Defendant makes the following arguments in relation to his claim that the district court abused its discretion in finding him in contempt of the court's January 17, 1997, preliminary injunction: 1) the contempt finding is inconsistent with the preliminary injunction itself and with the findings on which it was based; 2) the district court transformed the injunction, and retroactively held Defendant in contempt for violating it, by doing that which the injunction [*29] itself allowed; 3) the injunction order was at best ambiguous and unclear and could not properly form the basis of a finding of contempt; 4) Plaintiff was denied due process; and 5) the contempt finding was based on the false premise that Defendant had signed and was bound to a non-compete provision.

Under the limited standard of review afforded to a court in adjudicating an appeal from a district court's decision to hold a litigant in civil contempt, each of Defendant's arguments fail.

1. Whether the Contempt Finding was Inconsistent with the Preliminary Injunction and the Findings Upon which it was Based?

Defendant contends that a reasonable reading of the preliminary injunction allowed Defendant to work for Olympic/U.S. Steel joint venture, so long as the services which he rendered did not themselves involve laser blank welding. Defendant's contention is unpersuasive to the extent that a complete reading of the preliminary injunction also provides that Defendant was prevented from disclosing confidential information, as defined in the Agreement. Inasmuch as "civil contempt sanctions are designed to enforce compliance with court orders and to compensate injured parties[*30]

for losses sustained," Downey v. Clauder, 30 F.3d 681, 685 (6th Cir. 1994), Defendant's argument to enforce the preliminary injunction piecemeal cannot be accepted. "The basic proposition [in contempt proceedings] is that all orders and judgments of courts must be complied with promptly." Maness v. Meyers, 419 U.S. 449, 458, 42 L. Ed. 2d 574, 95 S. Ct. 584 (1975). As such, the preliminary injunction order must be viewed in its entirety; and, in doing so, it is clear that the order specifically prevented Defendant from rendering any service involving laser blank welding, as well as from using any confidential information in whole or in part.

2. Whether the District Court Transformed the Preliminary Injunction, and Retroactively Held Defendant in Contempt for Violating It, by Doing that Which the Preliminary Injunction Itself Allowed?

Defendant argues that by any fair reading of the December 18, 1996 ruling of state court Judge Kelly, the January 17, 1997 ruling of Judge Hackett, and the January 17, 1997 preliminary injunction order, Defendant was not precluded from rendering the services that he began to render after the entry of the preliminary [*31] injunction inasmuch as he was not "rendering any service involving laser blank welding." Defendant contends that he acted in accordance with the preliminary injunction. Defendant therefore contends that, in holding him in contempt, the district court erroneously expanded the preliminary injunction to prevent Defendant from working on the joint venture in any capacity. Defendant maintains that the district court impermissibly took the position that "because the joint venture would at some point in the future begin to provide laser welding services, any work on behalf of the joint venture, as competitor of Utilase, was precluded." Defendant also maintains that Plaintiff

erroneously argues for the first time on appeal that the district court violated the "confidentiality" portion of the preliminary injunction (the first item listed on the preliminary injunction), and not the "non-compete" portion (the second item listed on the preliminary injunction), inasmuch as the district court indicated at the show-cause hearing that its concern was with the non-compete provision.

Defendant's argument lacks merit. First, as indicated in Defendant's brief, the district court found that [*32] Defendant was in contempt of the preliminary injunction because Defendant "signed a confidentiality agreement. Based on that and the conduct described at the time, this court granted injunctive relief. That confidentiality agreement makes it clear that he cannot compete for one year.... He's going to be held to the terms of the that non-compete agreement. He's going to be held to the terms of the confidentiality agreement he signed." Therefore, a review of the record does not support Defendant's claim. It is clear that the district court considered both the confidentiality portion as well as the non-compete portion of the preliminary injunction in finding Defendant in contempt.

Furthermore, in reviewing a district court's findings of fact regarding the issuance of a contempt order, this Court may only reverse if the findings are clearly erroneous, and "where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." See Anderson, 470 U.S. at 573. As such, where it is plausible in light of the record that the district court found that Defendant violated the both sections of the preliminary injunction, this [*33] Court must give deference to that finding, and Defendant's argument that the district court impermissibly expanded the purview of the preliminary injunction and applied it retroactively fails. Id.

3. Whether the January 17, 1997 Preliminary Injunction Order was Ambiguous and Unclear, and Cannot Form the Basis for a Contempt Finding?

Defendant argues that because it is impossible to determine from the four corners of the district court's January 17, 1997 preliminary injunction order that the acts found to be contemptuous were forbidden, the preliminary injunction was ambiguous. Specifically, Defendant contends that the preliminary injunction did not clearly and unambiguously prevent Defendant from working on the joint venture in any capacity; rather, it simply prevented him from working on the joint venture in regard to laser blank welding. Defendant further argues that the ambiguity must be resolved in favor of Defendant.

The preliminary injunction is not ambiguous where it clearly prevents Defendant from "rendering any service involving laser blank welding to any person, partnership, corporation, or organization...." Q.A. at 49 (emphasis added).) Accordingly, [*34] when the district court determined at the show cause hearing that Defendant was providing information as to the layout or construction of the building which would ultimately house the laser blank welding facility of Plaintiff's competitor, that the district court did not err in finding that Defendant was in violation of the preliminary injunction.

Defendant's reliance on Grace v. Center for Auto Safety, 72 F.3d 1236 (6th Cir. 1996) is unpersuasive. In Grace, a panel of this Court found that a permanent injunction was ambiguous and therefore reversed a district court's order of contempt. Id. at 1241-43. Grace is distinguishable inasmuch as the Court in Grace found that a reference to the term "parties' attorneys" should not have been

limited to those attorneys who had filed an "official" appearance in the case at issue. Id. However, in this case, Defendant is attempting to limit the terms of the preliminary injunction to include those acts of providing information regarding laser blank welding, contrary to the injunction's restriction on providing confidential information as well. As such, Defendant's proposition is inapposite to the [*35] holding of Grace. The preliminary injunction here makes clear that Defendant was not to use any of Plaintiff's confidential information or render any services regarding the laser blank welding. Although this may cover a broad area of information, the breadth of the injunction does not make it ambiguous. Id.

4. Whether Defendant was Denied Due Process, and

5. Whether Contempt Finding was Based on False Premise that Defendant had signed a Non-compete provision?

Defendant argues that he was denied due process because he was denied the benefit of notice or an opportunity to be adequately heard. Defendant contends that the show cause hearing in question was to determine what Defendant did with a confidential document (the list of twenty-three items) that was found in his home and that, as such, he was not noticed about the incident for which he was ultimately found in contempt of court -- the supervision of the construction of the laser welding plant for Plaintiff's competitor.

As found in NLRB v. Cincinnati Bronze, 829 F.2d at 589, "[a] civil contemner is entitled to the procedural safeguards afforded by the due process clause: ...proper notice [*36] and an impartial hearing with an opportunity to present a defense." In this case, on April 11, 1997, three months after the preliminary injunction was

entered, during a hearing on discovery motions, Plaintiff brought to the district court's attention the fact that, despite Defendant's representation under oath that he had destroyed all documents reflecting Plaintiff's confidential information, a list containing twenty-three confidential items was found in Defendant's home. In light of this discovery, Plaintiff requested that the district court order Defendant's new employer (Olympic) to disgorge any documents that it may have acquired from Defendant regarding its confidential information. Defense counsel objected, however, claiming that he represented Defendant, not Olympic, and that the district court could not order a nonparty to the suit to produce information. In this context, the district court ordered a show cause hearing as to why Defendant should not be held in contempt for violating the injunction, and ordered Defendant to "bring with him all of the things that he may have been doing for his present employer."

Accordingly, under these facts, for Defendant to now contend that[*37] he was not noticed regarding the scope of the show cause hearing is disingenuous. The district court entered a show cause order directing Defendant to "SHOW CAUSE why he should not be held in contempt of court for violation of court order" -- the preliminary injunction. Where the terms of the preliminary injunction clearly state that Defendant was not to use Plaintiff's confidential information or otherwise render services involving laser blank welding, Defendant was properly noticed that any activity in which he may be engaged in violation of the injunction would be at issue. See Cincinnati Bronze, 829 F.2d at 589-90 (finding that the civil contemner was provided due process); compare Fisher v. Marubeni Cotton Corp., 526 F.2d 1338 (8th Cir. 1975) (finding that the contemner, a nonparty witness, who was not represented by counsel

was not properly noticed where the judge had given him no indication that he had been found in contempt).

Furthermore, Defendant's argument that he did not sign a non-compete clause and that the court's finding was therefore erroneous is misplaced, where such an argument is a challenge to the substance of the district court's [*38] preliminary injunction, and not a challenge to whether Defendant violated the terms thereof. Moreover, Defendant's argument contrary to his claim that the district court's injunction only prevented him from competing in the laser blank welding industry. See supra discussion at 1 and 2.

In summary, the district court did not abuse its discretion in holding Defendant in contempt of the January 17, 1997 preliminary injunction, where the court's findings of fact were not clearly erroneous.

CONCLUSION

For the above stated reasons, the district court's order granting Defendant's motion for partial summary judgment on Count 2 of Plaintiffs complaint for misappropriation of trade secrets is AFFIRMED.

CONCUR BY RYAN and BATCHELDER (In Part)

CONCUR: RYAN and BATCHELDER, Circuit Judges, concurring in part. We concur fully in that portion of Judge Clay's lead opinion which holds that the district court did not err in entering summary judgment for the defendant on the plaintiff's claims of misappropriation of trade secrets. We do not agree, however, with Judge

Clay's disposition of the defendant Mark S. Williamson's cross-appeal on the contempt issue and write separately to hold [*39] that for the reasons stated hereafter, the district court misunderstood the terms of the injunctive order the defendant was found to have disobeyed, and as a result abused its discretion in holding the defendant in contempt. Therefore, we will set aside the adjudication of contempt.

I. It is well settled, of course, that we review a district court's finding of contempt for abuse of discretion. See Harrison v. Metropolitan Gov't of Nashville, 80 F.3d 1107, 1112 (6th Cir. 1996). And a court abuses its discretion when it predicates an adjudication of contempt, as occurred here, upon a misunderstanding of the terms of the preliminary injunctive order the defendant was found to have violated.

On January 17, 1997, the district court entered the following order:

NOW THEREFORE, IT IS ORDERED, that for the reasons set forth on the record, Mark Williamson is ENJOINED until November 8, 1997 or during the pendency of the above-captioned action, whichever is shorter, from the following:

1. Communicating, using, or disclosing in whole or in part, any Confidential Information, Invention, or Confidential Document, all as defined in the March 15, 1990 Confidentiality [*40] Agreement;

2. Rendering any service involving laser blank welding to any person, partnership, corporation, or organization; and

3. Retaining, removing, copying, or destroying any Confidential Document or Invention, all as defined in the March 15, 1990 Confidentiality Agreement, or product of Utilase, Inc.

On April 16, 1997, following a wide-ranging, two-hour evidentiary hearing at which the district court apparently understood that it was requiring Williamson to show cause why he should not be held in contempt for violating the court's January 17, 1997, preliminary injunction (although that was not the announced purpose of the hearing), the court issued an order which in relevant part reads:

For the reasons stated on the record, it is ordered as follows:

1 . Defendant Mark Williamson is found in contempt of the Court's January 17, 1997 Order Granting Preliminary Injunction.

We note in passing that there are two additional numbered paragraphs in the court's order, but neither of them is concerned with any finding of fact or conclusion of law relating to the court's adjudication of contempt; instead, they describe in some detail additional and more specific [*41] conduct for which the defendant Williamson was newly enjoined.

It is difficult to discern precisely what it is that the district court found was the defendant's contumacious conduct, because the court did not make written findings of fact identifying (1) the specific language of the injunctive order found to have been violated, and (2) the specific conduct constituting the violation. Indeed the court's single-sentence adjudication of contempt makes no reference to which of the three paragraphs of the court's preliminary order it

found was violated. It makes no finding of fact, whatever, to indicate to a reader, including this court, what it is the defendant did or failed to do that amounted to contempt of the court's January 17, 1997, order. Instead, the introductory sentence of the district court's brief order holding the defendant in contempt advises the reader that the adjudication of contempt is made "for the reasons stated on the record," by which, apparently, is meant the transcript of the April 16, 1997, hearing. A careful study of that transcript reveals that the district court may have been confused, but unquestionably was mistaken, as to the terms of its preliminary injunction [*42] of January 17, 1997.

The record of the hearing of April 16 reveals that the district court apparently found the defendant in contempt for violating a supposed prohibition against competing with his former employer for one year:

THE COURT: But they're [Williamson and his new employer, Olympic Steel] still out there and in business for all intents and purposes, are they not, posturing themselves to compete?

MR. BOONSTRA: They are -- well, they're in business in the sense that they are a legal entity, I believe now. They weren't when this case began. And I believe that the owners of the joint venture have made arrangements to purchase equipment and that type of thing, yes.

THE COURT: To do what?

MR. BOONSTRA: To do laser blank welding.

THE COURT: Okay. That's what I thought....

THE COURT: ... I find him in contempt. Mark S. Williamson signed a confidentiality agreement. Based on that and conduct described at the time, this court granted injunctive relief. That confidentiality agreement makes clear that he cannot compete for one year.

He has gone to work for a competitor....

Now he is bound not to compete for [*43] one year. That is, until November the 8th, 1997, based on what has been stated on the record.

The non-compete means in any capacity where he is drawing on what he learned in his prior employment, and frankly, in any way that will assist the new employer and work against the interests of his prior employer, Utilase.

If there's something that he could do that would not compete, I would hear him, but nothing that he has described suggests that he's not in competition or not in violation of this court's order.... He was given an opportunity to provide for himself and his family, short of working for a competitor that he approached.

... Based on the record I have before me, I see no way to address this other than grant the relief sought by Utilase and at this point indicate that there will be no employment with the competitor in any capacity, that's laser production. I don't know if he can do it with some other, but if it's laser, he's competing, And if there's some

other way that he can find employment outside of the laser industry, he's free to do so.

What the district court apparently was referring to in repeatedly declaring that the defendant [*44] was obligated "not to compete for one year" is paragraph five of the confidentiality agreement. That paragraph provides:

5. Subsequent Business Relationships. This Agreement shall not be ... construed or interpreted to prevent or prohibit the Promisor from accepting or engaging in business of its choice one (1) year after expiration or termination of Promisor's relationship with Utilase.

However, there is no language in the court's preliminary injunction incorporating paragraph five of the confidentiality agreement and no provision, whatever, providing that "he cannot compete for one year"; cannot "work for a competitor" or is "bound not to compete for one year." What the court's order does provide is that Williamson may not "render[ ] any service involving laser blank welding to any person." While it may be that his work for his current employer amounts to a breach of his confidentiality agreement (that question is not before us), it does not violate the injunction.

Although, in the course of finding the defendant in contempt the court mentioned the terms "laser,' "laser production," and "laser industry," these references were in the context of the observation [*45] that the defendant "cannot compete for one year," was "bound not to compete," and was "working for a competitor."

Thus it is clear that the whole predicate, indeed the factual basis for the court's finding of contempt -- that Williams has "gone to work for a competitor" and violated a supposed order "that he cannot compete for one year" -- refers to the court's understanding of the terms of paragraph five of the confidentiality agreement and not to the specific language of the preliminary injunction. Obviously, the district court mistakenly believed that paragraph five of the confidentiality agreement had been incorporated into the preliminary injunction. It had not. The injunction was far narrower and proscribed only "rendering any service involving laser blank welding."

Notwithstanding what the court said from the bench as to the reason for holding Williamson in contempt, much of the argument before us with respect to the contempt issue turned on whether the district court abused its discretion in finding that the defendant violated the preliminary injunction by "rendering any service involving laser blank welding." The defendant argued that the defendant's activities in serving as [*46] a project engineer to supervise the construction of the building that would ultimately house his employer's laser blank welding operation were not "service[s] involving laser blank welding." Frankly, it is difficult to understand how anyone could conclude that serving as a project engineer, supervising the construction of a building, could amount to "rendering a service involving ... welding," laser blank or otherwise. But reading what the district court said on the record, a portion of which is quoted above, clarifies the issue; the district court was not specifically finding that Williamson's activity in serving as a project engineer for the construction of a building later to house laser blank welding activity amounted to "rendering any service involving laser blank welding"; it was finding instead that Williamson violated a

supposed non-competition provision in the confidentiality agreement "not to compete for one year."

It is not difficult to understand how the district court could find that supervising the construction of a building at the behest of Utilase's competitor would be "work for a competitor." Indeed the court stated:

The non-compete means in any capacity [*47] where he is drawing on what he learned in his prior employment, and frankly, in any way that will assist the new employer and work against the interests of his prior employer, Utilase.

(Emphasis added.)

But the court's preliminary injunction did not contain a non-competition obligation; it contained no prohibition against "assisting the new employer," and no provision proscribing "work against the interests of his prior employer Utilase." The only specific prohibition was against rendering any "service involving laser blank welding."

We think the court was plainly mistaken as to the scope of paragraph two of its preliminary injunction and mistakenly believed that paragraph incorporated what the court thought was a one-year, non-competition provision of the confidentiality agreement.

Had the district court provided written findings of fact to support its order of contempt and spelled out the factual basis for its findings, it is quite likely the mistake would have been caught, and the error avoided. There were no such findings, and the mistake was not caught.

Accordingly, as to the cross-appeal, the judgment of contempt is vacated.